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STATUTES
AND
STATUTORY CONSTRUCTION

INCLUDING

A DISCUSSION OF LEGISLATIVE POWERS, CONSTITUTIONAL
REGULATIONS RELATIVE TO THE FORMS OF LEGIS-
LATION AND TO LEGISLATIVE PROCEDURE

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BY

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TABLE OF CONTENTS.

VOLUME II.

CHAPTER X.

JUDICIAL NOTICE AND PROOF OF STATUTES AND OF FACTS RELATING TO THEIR VALIDITY, OPERATION AND CONSTRUCTION.

- § 309. Judicial notice of statutes.
- 310. Courts will take notice of facts that affect the validity, operation or construction of a statute.
- 311. Judicial notice of facts relating to the passage or existence of statutes.
- 312. Judicial notice of English statutes and of the common law.
- 313. State statutes in the federal courts.
- 314, 315. Interpretation of state and federal laws.
- 316-319. Foreign statutes, how proved.
- 320. The functions of the court and jury in regard to foreign laws.
- 321, 322. Private statutes.
- 323. Miscellaneous cases.

CHAPTER XI.

-CLASSIFICATION AND DESCRIPTION OF STATUTES.

- § 324. The names of statutes.
- 325. Ancient statutes of England.
- 326. Federal, state, territorial and colonial statutes.
- 327, 328. Public and private statutes.
- 329, 330. Declaratory statutes.
- 331-333. Affirmative and negative statutes.
- 334. Perceptive, prohibitive and permissive statutes.
- 335. Prospective and retrospective statutes.
- 336. Remedial statutes.
- 337. Penal statutes.
- 338. Repealing statutes.

CHAPTER XII.

PARTS OF A STATUTE AND THEIR RELATIONS.

- § 339, 340. The title.
- 341, 342. The preamble.
- 343. The enacting style.

- § 344, 345. The purview — One part to be construed by another.
- 346. Partial conflict resolved into an exception.
- 347, 348. Words expanded or limited to accord with intent.
- 349, 350. Effect of total conflict between two parts of an act.
- 351-357. Provisos, exceptions and saving clauses.
- 358-360. Interpretation clauses.
- 361. Punctuation.
- 362. Headings and marginal notes.

CHAPTER XIII.

INTERPRETATION AND CONSTRUCTION — GENERAL PRINCIPLES.

- 363. The intent of the statute is the law.
- 364. To find out the intent is the object of all interpretation.
- 365. Interpretation and construction compared.
- 366. Intent first to be sought in language of statute itself.
- 367. If intent plainly expressed it is to be followed without further inquiry.
- 368. The entire statute to be considered in ascertaining intent.
- 369. General intent of statute the key to meaning of the parts.
- 370. The intention of the whole act will control interpretation of the parts.
- 371-373. Same — Illustrations.
- 374, 375. The flexibility of words and clauses to harmonize with general intent.
- 376-378. The literal sense not controlling.
- 379. Letter and intent.
- 380. Some effect, if possible, to be given every word, clause and sentence.
- 381. Words enlarged or restricted to carry out intent.
- 382. Words deemed inserted to carry out intent.
- 383. One word substituted for another.
- 384. Words disregarded or eliminated.
- 385. Implied exceptions to general language.
- 386. Transposition of words and phrases.
- 387. Particular and general intent.
- 388. There can be no intent of a statute not expressed in its words.
- 389. Interpretation of words and phrases — General rules.
- 390. Words and phrases should be construed as they are generally understood.
- 391. Meaning of words for the court — Sources of information.
- 392. How general words construed.
- 393. Technical words.
- 394-396. Words having both a popular and technical meaning.
- 397. Use of the words "or" and "and."
- 398. Words having a special sense in the common law.

- § 399. Statutory use of words.
- 400. Particular words and phrases construed.
- 401, 402. Change of phraseology of statutes.
- 403. Re-enacted statutes and parts of statutes.
- 404. Statutes adopted from other states or jurisdictions.
- 405. Statutes which adopt other statutes by particular or general reference.
- 406. Examples of the two modes of adoption.
- 407. Construction and effect of acts adopting other acts in particular cases.
- 408, 409. Interpretation with reference to grammatical sense.
- 410-413. Mistakes—Their correction and effect.
- 414-419. Effect of context and association of words and phrases—
Maxim, *noscitur a sociis*.
- 420, 421. Relative and qualifying words and phrases.
- 422-434. When general words follow particular—Doctrine of *ejusdem generis*.
- 435. General words following particular, will not include things of a superior class.
- 436. It is otherwise when this rule would leave the general words without effect.
- 437-441. Qualifications and exceptions to the rule of *ejusdem generis*.
- 442. *Reddendo singula singulis*.
- 443-448. Interpretation as affected by other statutes—Acts *in pari materia*.
- 449. When statutes are *in pari materia*.
- 450, 451. Resort to original acts in case of revisions and codifications.
- 452. Repealed and invalid statutes may be considered.
- 453-455. Interpretation with reference to the common law.
- 456. Extraneous facts in aid of construction.
- 457-460. Judicial knowledge.
- 461. Of facts relative to foreign states and nations.
- 462, 463. Judicial notice of historical and other facts relating to legislation.
- 464-469. Judicial knowledge of facts in general.
- 470. Proceedings in the legislature—Amendments, debates, committee reports, etc.
- 471. Surrounding facts and conditions—Mischief to be remedied.
- 472. Contemporaneous construction.
- 473-478. General usage and practical construction.
- 479-486. *Stare decises*.
- 487-490. Effects and consequences.
- 491-495. *Expressio unius est exclusio alterius*.
- 496-499. Presumptions.
- 500-512. Implications and incidents.

- § 513. Acts deemed to refer and apply to persons and things within the state and within the power of the legislature.
- 514. Whether state or public corporations embraced by general words of statute.
- 515. Mistake of legislature as to existence, application or effect of statute.
- 516. Miscellaneous.

CHAPTER XIV.

STRICT CONSTRUCTION.

- § 517-519. Literal and strict construction compared.
- 520-527. Strict construction of penal statutes.
- 528-530. Courts will not by the strict construction of penal statutes defeat the intention of the law-maker.
- 531-533. What statutes are penal.
- 534. Miscellaneous cases on the construction of penal statutes.
- 535. Revenue laws.
- 536-538. Statutes which impose burdens—Taxes.
- 539, 540. Exemption from taxation or other general burden.
- 541. Acts delegating the power of taxation.
- 542, 543. Statutes against common right.
- 544. Statutes of limitations.
- 545. Limitations as to new trials and appeals.
- 546. Statutes interfering with legitimate industries.
- 547. Statutes creating liability.
- 548. Public grants.
- 549. Grants of franchises and privileges.
- 550. Public grants of land in aid of railroads and for other purposes.
- 551. Acts creating municipal corporations or granting power thereto.
- 552, 553. Construction of particular powers to municipal corporations.
- 554-557. Acts creating private corporations or granting power thereto.
- 558. Public grants in general.
- 559-561. Statutes for exercise of power of eminent domain.
- 562-567. Statutes granting power.
- 568-570. Jurisdiction of courts.
- 571, 572. Statutory rights.
- 573-575. Statutes in derogation of the common law.
- 576-579. Interpretation clauses.
- 580. Retrospective laws.
- 581. Construction of acts affecting previous statutory policy.

CHAPTER XV.

LIBERAL CONSTRUCTION.

- § 582. General statement of the subject.
- 583-586. Remedial statutes to be liberally construed—What are remedial statutes.

- § 587, 588. Equitable construction.
- 588-590. What is liberal construction.
- 591-604. Illustrations of liberal construction.
- 605-609. *Casus omissus*.

CHAPTER XVI.

DIRECTORY AND MANDATORY STATUTES.

- § 610. Preliminary explanation of directory and mandatory statutes.
- 611. Whether statute directory or mandatory — General consideration.
- 612-616. Provisions directory as to time.
- 617. Time provisions held mandatory.
- 618-631. Formal and incidental requirements directory.
- 632, 633. Statutes which confer new right, privilege, etc.
- 634-636. Statutes which are permissive in form.
- 637, 638. Permissive statutes held mandatory.
- 639. Permissive statutes held not mandatory.
- 640. The words "may" and "shall."

CHAPTER XVII.

RETROACTIVE STATUTES.

- § 641. Retroactive statutes regarded with disfavor.
- 642, 643. Statutes operate prospectively only unless intent clear to the contrary.
- 644. Acts relating to husband and wife.
- 645. Acts relating to taxation.
- 646. Miscellaneous cases.
- 647. Retrospective statutes not necessarily invalid.
- 648. Constitutional provisions forbidding retrospective or retroactive laws.
- 649, 650. *Ex post facto* laws.
- 651. Acts relating to procedure only — General principles.
- 652. Particular acts held to be *ex post facto*.
- 653. Particular acts held not to be *ex post facto*.
- 654. Acts relating to evidence.
- 655. Acts in relation to jurisdiction — Change of venue, etc.
- 656. Acts relating to practice and procedure.
- 657. Habitual criminals statutes.
- 658. Change of punishment by subsequent legislation.
- 659. Changing the mode of executing sentence.
- 660-664. Laws impairing the obligation of contracts.
- 665-668. Change of remedy.
- 669. Whether judgment a contract.
- 670. Acts held not to impair contracts.
- 671-673. Vested rights inviolable.

- § 674. Remedial statutes may apply to past transactions and pending cases.
675-677. Curative statutes.

CHAPTER XVIII.

CONSTRUCTION OF PARTICULAR STATUTES.

- § 678. Scope and explanation of chapter.
679-684. Remedial statutes in general.
685. Arbitration statutes.
686-689. Acts relating to judicial procedure, pleading, practice, etc.
690, 691. Mechanics' lien statutes
692. Other lien laws.
693. Exemption statutes.
694. Attachment and garnishment statutes.
695-701. Civil damage acts.
702-705. Statutes of limitation.
706, 707. Acts changing the period of limitation.
708. Whether rights once barred may be revived.
709. Election and ballot laws.
710. Statutes giving an action for wrongful death.
711. Married women's acts.
712. Other acts relating to husband and wife.
713. Game laws.
714. Acts relating to public officers, their qualifications, compensation, election, etc.
715. Statutes requiring majority vote.
716. Words and provisions relating to time and its computation.
717. Statutes relating to appeals, writs of error, etc.
718. Statutes relating to costs.
719. Conflicting petitions for the organization of territory and the like.
720. Statutes giving new rights and remedies.
721. Miscellaneous.

STATUTES.

CHAPTER X.

JUDICIAL NOTICE AND PROOF OF STATUTES AND OF FACTS RELATING TO THEIR VALIDITY, OPERATION AND CON- STRUCTION.

§ 309 (181). **Judicial notice of statutes.**— Courts of justice take official notice of public statutes and the general jurisprudence of the state under whose authority they act.¹ They judicially know the origin and history of that jurisprudence, and all the facts which affect its derivation, validity, commencement and operation.² A state court will take notice of the federal constitution and amendments to

¹ *Downs v. Commissioners*, 2 Heenan, 2 Minn. 336; *Coburn v. Penn.* (Del.) 132, 45 Atl. 717; *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173; *Burfenning v. Chicago, etc. Ry. Co.*, 46 Minn. 20, 48 N. W. 444; *Sanborn v. People's Ice Co.*, 82 Minn. 43, 84 N. W. 641, 83 Am. St. Rep. 401, 51 L. R. A. 829; *State v. Seibert*, 130 Mo. 202, 32 S. W. 670; *State v. Webb's River Imp. Co.*, 97 Me. 559, 55 Atl. 495.

² *People v. Mahaney*, 13 Mich. 481; *Town of South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Post v. Supervisors*, 105 U. S. 667; *Opinion of Justices*, 52 N. H. 622; *Berry v. Baltimore, etc. R. R. Co.*, 41 Md. 446, 20 Am. Rep. 69; *People v. De Wolfe*, 62 Ill. 253; *Supervisors v. Heenan*, 2 Minn. 336; *Coburn v. Penn.* (Del.) 132, 45 Atl. 717; *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173; *Burfenning v. Chicago, etc. Ry. Co.*, 46 Minn. 20, 48 N. W. 444; *Sanborn v. People's Ice Co.*, 82 Minn. 43, 84 N. W. 641, 83 Am. St. Rep. 401, 51 L. R. A. 829; *State v. Seibert*, 130 Mo. 202, 32 S. W. 670; *State v. Webb's River Imp. Co.*, 97 Me. 559, 55 Atl. 495; *Dodd*, 14 Ind. 347; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *De Bow v. People*, 1 Denio, 9; *Commercial Bank v. Sparrow*, 2 id. 97; *Purdy v. People*, 4 Hill, 384; *Ryan v. Lynch*, 68 Ill. 160; *Lanning v. Carpenter*, 20 N. Y. 447; *Lusher v. Scites*, 4 W. Va. 11; *Rumsey v. People*, 19 N. Y. 48; *Lorman v. Benson*, 8 Mich. 18, 25, 77 Am. Dec. 435; *Stokes v. Macken*, 62 Barb. 145; *Neeves v. Burrage*, 14 Ad. & El. (N. S.) 504; *State v. Stearns*, 72 Minn. 200, 75 N. W. 210; *Bowen v. Missouri Pac. Ry. Co.*, 118 Mo. 541, 24 S. W. 436; *Ruckert v. Grand Ave. Ry. Co.*, 163 Mo. 260, 63 S. W. 814; *McDonald v. State*, 80 Wis. 407, 50 N. W. 185.

it³ and the public acts of congress.⁴ The courts of a state carved out of the territory of another take judicial notice of the statutes of the old state in force up to the time of the separation.⁵ The states formed from territory ceded by Spain will take notice of the Spanish law existing prior to the cession affecting rights and titles then in being.⁶

§ 310 (182). **Courts will take notice of facts that affect the validity, operation or construction of a statute.**—The courts will take judicial notice of whatever may affect the validity or meaning of a statute.⁷ They will take notice of events generally known within their jurisdiction, of the history of legislation, and of the reasons urged for and against the passage of a law.⁸ They will inform themselves of facts which may affect a statute; for example, the precise time when it was approved, to determine its existence, commencement or any other fact for like purpose.⁹ They will take notice of the terms in which an act was passed, though

³ *Graves v. Keaton*, 3 Cold. 8.

⁴ *Dickenson v. Breeden*, 30 Ill. 279; *Gooding v. Morgan*, 70 id. 275; *Papin v. Ryan*, 32 Mo. 21; *Kessel v. Albetis*, 56 Barb. 362; *Semple v. Hagar*, 27 Cal. 163; *Rice's Succession*, 21 La. Ann. 614; *Morris v. Davidson*, 49 Ga. 361; *Flanigen v. Washington Ins. Co.*, 7 Pa. St. 306; *Bayly v. Chubb*, 16 Gratt. 284.

⁵ *Delano v. Jopling*, 1 Litt. 417; *Berluchaux v. Berluchaux*, 7 La. 539.

⁶ *United States v. Turner*, 11 How. 663, 668, 13 L. Ed. 857; *United States v. King*, 7 How. 883, 12 L. Ed. 934; *United States v. Philadelphia*, 11 How. 609, 13 L. Ed. 834; *Arguello v. United States*, 18 How. 550, 15 L. Ed. 478; *Fremont v. United States*, 17 How. 542, 15 L. Ed. 241; *Chouteau v. Pierre*, 9 Mo. 3; *Ott v. Soulard*, id. 581; *Doe v. Eslava*, 11 Ala. 1028.

⁷ *Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *State v. Westfall*, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571; *State v. Ames*, 87 Minn. 23, 91 N. W. 18; *State v. Wofford*, 121 Mo. 61, 25 S. W. 851; *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638; *State v. County Com'rs*, 138 Mo. 427, 30 S. W. 103, 31 S. W. 23; *State v. Norris*, 37 Neb. 299, 55 N. W. 1086; *Stratton v. Oregon City*, 35 Ore. 409, 60 Pac. 905; *Fitzgerald v. Phelps & B. Windmill Co.*, 42 W. Va. 570, 26 S. E. 315.

⁸ *Redell v. Moores*, 63 Neb. 219, 227, 88 N. W. 243; *Texas & Pac. Ry. Co. v. Interstate Com. Commission*, 163 U. S. 197, 16 S. C. Rep. 666, 40 L. Ed. 940; *Barnard v. Gall*, 43 La. Ann. 959, 10 So. 5.

⁹ *Gardner v. The Collector*, 6 Wall. 499, 18 L. Ed. 890; *Louisville v. Savings Bank*, 104 U. S. 469, 26

they differ from those of the officially published statutes.¹⁰ No issue by pleading can be made by the parties involving such facts to be tried by evidence.¹¹ The judges make the proper inquiry to inform themselves in the best way they can. An eminent jurist says: "An act of parliament, made within the time of memory, loses not its being so because not extant of record, especially if it be a general act of parliament. For of the general acts of parliament the courts of common law are to take notice without pleading them. And such acts shall never be put to be tried by the record upon an issue of *nul tiel record*, but shall be tried by the court, who, if there be any difficulty or uncertainty touching it, or the right of pleading it, are to use for their information ancient copies, transcripts, books, pleadings and memorials to inform themselves, but not to admit the same to be put in issue by a plea of *nul tiel record*. For, as shall be shown hereafter, there are many old statutes which are admitted and obtain as such, though there be no record at this day extant thereof; nor yet any other written evidence of the same, but which is in a manner only traditional, as namely, ancient and modern books of pleading and the common received opinion and reputation and approbation of the judges learned in the law."¹² Where an act is only to operate when adopted by popular vote, the court will take notice of the result of such a vote.¹³ So where a general law for the incorporation of cities provides that any city

L. Ed. 775; *Cargo of Brig Aurora v. United States*, 7 Cranch, 382, 3 L. Ed. 378; *Lapeyre v. United States*, 17 Wall. 191, 21 L. Ed. 606; *Kennedy v. Palmer*, 6 Gray, 316; *Burgess v. Salmon*, 97 U. S. 381, 24 L. Ed. 1104; *Leavenworth Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114; *Ottman v. Hoffmann*, 7 Misc. 714, 28 N. Y. S. 28; *ante*, § 179.

¹⁰ *Gardner v. The Collector*, 6 Wall. 499, 18 L. Ed. 890; *Purdy v. People*, 4 Hill, 384; *De Bow v. Peo-*

ple, 1 Denio, 14; *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647; *Brady v. West*, 50 Miss. 68.

¹¹ *Town of South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154.

¹² *Hale's Hist. Com. L.* 14, 16.

¹³ *Andrews v. Knox County*, 70 Ill. 65; *State v. Swift*, 69 Ind. 505; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *Ranch v. Commonwealth*, 79 Pa. St. 490. But see *Whitman v. State*, 80 Md. 410, 31 Atl. 325.

under a special charter may adopt any chapter or section, in lieu of its charter on the same subject, the court will take notice of such adoption.¹⁴

§ 311 (183). **Judicial notice of facts relating to the passage or existence of statutes.**¹⁵ — While the constitution or a statute may provide what shall be conclusive evidence of the due passage or existence of a statute,¹⁶ the inquiry is not generally so restricted, and the general principle governs that record or constitutional evidence must be adduced to impeach a statute the record of which is fair on its face.¹⁷ Where the purpose is not to invalidate the statute, but to give it effect, to ascertain the fact on which the taking effect depends, or to ascertain the time more precisely than appears by the record, any source of information which is capable of conveying to the judicial mind a clear and satisfactory answer is available.¹⁸ Extraneous facts relating to the subject of the statute fair on its face, or the procedure to enact it, will not be considered for the purpose of overturning it for some infraction of the constitution, unless a statute or the constitution itself has provided for such proof.¹⁹ In the absence of such provisions, a court cannot resort to the legislative rolls and journals for the purpose of exam-

¹⁴ *Davey v. Janesville*, 111 Wis. 628, 87 N. W. 813.

¹⁵ Consult chapter II on this subject.

¹⁶ *Town of South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154.

¹⁷ *English v. Oliver*, 28 Ark. 317; *Worthen v. Badgett*, 32 id. 496; *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *State v. Hastings*, 24 Minn. 78; *Larrison v. Peoria*, etc. R. R. Co., 77 Ill. 11; *Pangborn v. Young*, 32 N. J. L. 29; *Legg v. Mayor*, etc., 42 Md. 203, 224; *State v. County of Dorsey*, 28 Ark. 378; *Wall*, Ex parte, 48 Cal. 279, 17 Am. Rep. 425; *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70; *Rumsey v.*

People, 19 N. Y. 48; *De Camp v. Eveland*, 19 Barb. 88; *Lanning v. Carpenter*, 20 N. Y. 447; *Duncombe v. Prindle*, 12 Iowa, 1; *Lusher v. Scites*, 4 W. Va. 11. See *Bradley v. Commissioners*, 2 Humph. 428, 37 Am. Dec. 563; *Ford v. Farmer*, 9 Humph. 152.

¹⁸ *Wells v. Bright*, 4 Dev. & Batt. L. 173; *Louisville v. Savings Bank*, 104 U. S. 469, 26 L. Ed. 775; *Gardner v. The Collector*, 6 Wall. 499, 18 L. Ed. 890.

¹⁹ *Ante*, § 29; *Matter of Church*, 28 Hun, 476; *Matter of New York Elevated R. R. Co.*, 70 N. Y. 327, 351; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154.

ining as to whether the bill as passed is the same as the bill certified;²⁰ nor for the purpose of determining whether the statute passed in conformity with rules adopted by the legislature for its own government.²¹ It cannot resort to extrinsic evidence to show that the certified and published law actually passed.²² The court will take notice of the proclamation of the governor convening a special session of the legislature in order to determine whether an act passed at such session is within the call.²³

§ 312 (184). Judicial notice of English statutes and of the common law.—The written law of a state embraces as well the statutes in force at the time of its organization, and not in conflict with its constitution, as those subsequently enacted.²⁴ The laws of England, written and unwritten, or, as it has been otherwise expressed, the common law and all the statutes of parliament in aid of the common law, in force at the time of the emigration to this country, were brought hither by the emigrants who first settled the original colonies, as a birthright, so far as those laws were suitable to the circumstances and conditions which existed in the new country.²⁵ To them they were unwritten laws. Subsequent acts of parliament did not affect the colonies

²⁰ Pangborn v. Young, 32 N. J. L. 29; Sherman v. Story, 30 Cal. 253, 89 Am. Dec. 93; Coleman v. Dobbins, 8 Ind. 156; Grob v. Cushman, 45 Ill. 119; Green v. Weller, 32 Miss. 650; 1 Whart. on Ev., § 290.

²¹ Id.

²² Mayor, etc. v. Harwood, 32 Md. 471.

²³ Wells v. Missouri Pac. Ry. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; Bowen v. Missouri Pac. Ry. Co., 118 Mo. 541, 24 S. W. 436.

²⁴ American Ins. Co. v. Canter, 1 Pet. 511, 7 L. Ed. 242; Brice v. State, 2 Overt. 254; Egnew v. Cochran, 2 Head, 320; Lee v. King, 21 Tex. 577.

²⁵ 2 P. Wms. 75; Blankard v. Galdy, 2 Salk. 411; Scott v. Lunt's Adm'r, 7 Pet. 603, 8 L. Ed. 797; Commonwealth v. Knowlton, 2 Mass. 534; O'Ferrall v. Simplot, 4 Iowa, 400; Dodge v. Williams, 46 Wis. 92; Gardner v. Cole, 21 Iowa, 205; Williams v. Williams, 8 N. Y. 541; Calloway v. Willie's Lessee, 2 Yerg. 1; Clawson v. Primrose, 4 Del. Ch. 643, 652; Stump v. Napier, 2 Yerg. 35; Carter v. Balfour, 19 Ala. 814; Horton v. Sledge, 29 id. 478; Nelson v. McCrary, 60 id. 301; McCorry v. King, 3 Humph. 267, 39 Am. Dec. 165; Webster v. Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278; Coburn v. Harvey, 18 Wis.

unless named or the acts related to the prerogatives of the crown.²⁶

In states formed from colonies settled by Englishmen, and in those which are shown to have adopted the common law by statute or constitution, it will be presumed to continue as a system of jurisprudence. And recognizing its existence in another state, the court will take notice of its principles,²⁷ but not of any peculiarities, exceptional in the foreign state and divergent from the law of the court. On principle, the courts of one state cannot presume the existence of any law in another state. The circumstance that a written law modifying or supplementing the common law has been enacted in the state where the court sits is no evidence that a like statute has been passed in another state.²⁸ It has, however, often been decided that where a case or defense depends on the law of another state, and that law has not been proved, the court will presume it to be the

147; *Sackett v. Sackett*, 8 Pick. 309; *Bruce v. Wood*, 1 Met. 542; *Commonwealth v. Churchill*, 2 id. 123; *Stout v. Keyes*, 2 Doug. (Mich.) 184, 44 Am. Dec. 465; *Powell v. Brandon*, 24 Miss. 363; *Jacob v. State*, 3 Humph. 493; *Griffith v. Beasley*, 10 Yerg. 434; *Drew v. Wakefield*, 54 Me. 291; *Pemble v. Clifford*, 2 McCord, 31; *Gough v. Pratt*, 9 Md. 526; *Canal Com'rs v. People*, 5 Wend. 445; *Fowler v. Stoneum*, 11 Tex. 478; *Boehm v. Engle*, 1 Dall. 15; *Ayres v. Methodist Ch. etc.*, 3 Sandf. 368; *Attorney-General v. Stewart*, 2 Meriv. 162; *Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374; *Tappan v. Campbell*, 9 Yerg. 436; *Cathcart v. Robinson*, 5 Pet. 280, 8 L. Ed. 120.

²⁶ *Matthews v. Ansley*, 31 Ala. 20; *Carter v. Balfour*, 19 id. 329; *McKineron v. Bliss*, 31 Barb. 180; *Sack-*

ett v. Sackett, 8 Pick. 309; *Commonwealth v. Knowlton*, 2 Mass. 534; *Porter's Lessee v. Cocke*, Peck, 30; *Preston v. Surgoine*, id. 80; *Chapron v. Cassaday*, 3 Humph. 661; *Rolfe v. McComb*, 2 Head, 558; *Smith v. Mitchell*, Rice, 316; *Stokes v. Macken*, 62 Barb. 145.

²⁷ *Cressey v. Tatom*, 9 Ora. 542; *Goodwin v. Morris*, id. 323; *Norris v. Harris*, 15 Cal. 226; *Wallace v. Burden*, 17 Tex. 467; *Vardeman v. Lawson*, id. 10; *Holmes v. Broughton*, 10 Wend. 75, 25 Am. Dec. 536; 1 Whart. on Ev., § 314; *McDeed v. McDeed*, 67 Ill. 545; *Kingsley v. Kingsley*, 20 id. 203; *Abel v. Douglass*, 4 Denio, 305; *Andrews v. Hoxie*, 5 Tex. 171; *Titus v. Scantling*, 4 Blackf. 89; *Smith v. Bartram*, 11 Ohio St. 691.

²⁸ *Kermott v. Ayer*, 11 Mich. 181; *Ellis v. Maxson*, 19 id. 186.

same as that which is in force in its own jurisdiction.²⁹ If this were the common law the presumption would be natural, logical, legal,³⁰ but the cases are not so confined; the presumption is applied literally and comprehensively.³¹ The result would be the same and its basis would be more satisfactory if the principle were formulated thus: the law of another state in certain cases is applied by comity, when proved; if not proved, there is no comity invoked, and the *lex fori* governs.³²

²⁹ Territt v. Woodruff, 19 Vt. 182; Pauska v. Daus, 31 Tex. 67; McDonald v. Myles, 12 Sm. & M. 279; Harris v. Allnutt, 12 La. 465; Mason v. Mason's Widow, id. 589; Dwight v. Richardson, 12 Sm. & M. 325; Bemis v. McKenzie, 13 Fla. 553; Holley v. Holley, Lit. Sel. Cas. 505; Selking v. Hebel, 1 Mo. App. 340; Paget v. Curtis, 15 La. Ann. 451; Nalle v. Ventress, 19 id. 373; Allen v. Watson, 2 Hill (S. C.), 319; Desnoyer v. McDonald, 4 Minn. 515; Whidden v. Seelye, 40 Me. 247; Thurston v. Percival, 1 Pick. 415; Fouke v. Fleming, 13 Md. 392, 407; Surlott v. Pratt, 3 A. K. Marsh. 174; Thomas v. Beckman, 1 B. Mon. 29, 34; Prince v. Lamb, Breese, 378; Leavenworth v. Brockway, 2 Hill, 201; Crozier v. Hodges, 3 La. 357; Hall v. Woodson, 13 Mo. 462; Lougee v. Washburn, 16 N. H. 134; Stokes v. Macken, 62 Barb. 145; Langdon v. Young, 33 Vt. 136; Chase v. Ins. Co., 9 Allen, 311; Cluff v. Ins. Co., 13 id. 308; Conolly v. Riley, 25 Md. 402; Green v. Rugely, 23 Tex. 539; Hall v. Pillow, 31 Ark. 32; Hydrick v. Burke, 30 id. 124; Warren v. Lusk, 16 Mo. 102; Houghtailing v. Ball, 19 Mo. 84, 59 Am. Dec. 331; Lucas v. Ladew, 28 Mo. 342; Robinson v. Dauchy, 3 Barb. 20; Pome-roy v. Ainsworth, 22 id. 118; Huth v. Ins. Co. 8 Bosw. 538; Wright v. Delafield, 23 Barb. 498; Bradley v. Ins. Co., 3 Lans. 341; Savage v. O'Neil, 44 N. Y. 298; Smith v. Smith, 19 Gratt. 545; Bean v. Briggs, 4 Iowa, 464; Crafts v. Clark, 38 Iowa, 237; Crake v. Crake, 18 Ind. 156; Davis v. Rogers, 14 Ind. 424; Crane v. Hardy, 1 Mich. 56; Ellis v. Maxson, 19 id. 186, 2 Am. Rep. 81; Cooper v. Reaney, 4 Minn. 528; Brimhall v. Van Campen, 8 id. 13, 82 Am. Dec. 118; Rape v. Heat-on, 9 Wis. 328, 76 Am. Dec. 269; Walsh v. Dart, 12 Wis. 635; State v. Patterson, 2 Ired. L. 346, 88 Am. Dec. 699; Atkinson v. Atkinson, 15 La. Ann. 491; Hickman v. Alpaugh, 21 Cal. 225; Hill v. Grigsby, 32 Cal. 55; Mostyn v. Fabrigas, 1 Cowper, 174; Smith v. Gould, 4 Moore, P. C. 21; State v. Cross, 68 Iowa, 180, 26 N. W. 62; Van Wyck v. Hills, 4 Rob. 140; Phila. Bank v. Lambeth, 4 Rob. 463; Barringer v. Ryder, 119 Iowa, 121, 93 N. W. 56.

³⁰ See Diez, In re, 56 Barb. 591; Lockwood v. Crawford, 18 Conn. 361.

³¹ Id.

³² See O'Rourke v. O'Rourke, 43 Mich. 58; Martin v. Martin, 1 Sm. & M. 176; Bock v. Lauman, 24 Pa. St.

In *Monroe v. Douglass*,³³ Foot, J., speaking for the court of appeals, said: "It is a well-settled rule, founded on reason and authority, that the *lex fori*, or, in other words, the laws of the country to whose courts a party appeals for redress, furnish, in all cases, *prima facie*, the rule of decision; and if either party wishes the benefit of a different rule of law, as, for instance, *the lex domicilii*, *lex loci contractus*, or *the lex rei sitæ*, he must aver and prove it."³⁴

§ 313 (185). State statutes in the federal courts.— It was enacted by congress in 1789 "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."³⁵ The circuit courts of the United States are created by congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government, by the constitution, extends to many cases arising under the laws of the different states. And the supreme court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisprudence is then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States by the ordinary modes of proof by which the laws of a foreign country are

435; *Peacock v. Banks, Minor* (Ala.), 387; *Williams v. Wade*, 1 Met. 82; *Greenwade v. Greenwade*, 3 Dana, 495; *McDonald v. Myles*, 12 S. & M. 279; *Story, Conf. 'L.* (7th ed.) § 637a; *Monroe v. Douglass*, 5 N. Y. 447; *Bean v. Briggs*, 4 Iowa, 464; *Sayre v. Wheeler*, 32 Iowa, 559; *Allen v. Watson*, 2 Hill (S. C.), 319; *Woodrow v. O'Conner*, 28 Vt. 776; *Whidden v. Seelye*, 40 Me. 247; *Stokes v. Macken*, 62 Barb. 145; *Bristow v. Sequeville*, 5 Ex. 275, 279; *Lide v. Parker*, 60 Ala. 165. ³³ 5 N. Y. 447, 452. ³⁴ *Norris v. Harris*, 15 Cal. 254; *Greenwade v. Greenwade*, 3 Dana, 495; *Tarleton v. Briscoe*, 4 Bibb. 73; *Thurston v. Percival*, 1 Pick. 415. ³⁵ Sec. 34, Judiciary Act 1739, 1 Stat. at Large, 92; sec. 721, R. S. U. S.

to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.³⁶ The relation in which the circuit courts of the United States stand to the states in which they respectively sit and act is precisely that of their own courts as to the rules of decision.³⁷ A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality.³⁸ The law of any state of the Union, whether depending upon statutes or upon opinions, is a matter of which the courts of the United States are bound to take notice without plea or proof.³⁹ It thus ap-

³⁶ *Owings v. Hull*, 9 Pet. 607, 624, 9 L. Ed. 246; *Pennington v. Gibson*, 16 How. 65, 14 L. Ed. 847; *Covington Drawbridge v. Shepherd*, 20 How. 227, 15 L. Ed. 896; *Griffing v. Gibb*, 2 Black, 519, 17 L. Ed. 353; *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604; *Junction R. R. Co. v. Bank of Ashland*, 12 Wall. 229, 20 L. Ed. 385; *Elwood v. Flannigan*, 104 U. S. 562, 26 L. Ed. 842; *Case v. Kelly*, 133 U. S. 21, 10 S. C. Rep. 216, 33 L. Ed. 518; *Louisville, etc. R. R. Co. v. Mississippi*, 133 U. S. 587, 10 S. C. Rep. 348; *Peters v. Bain*, 133 U. S. 670, 10 S. C. Rep. 354, 33 L. Ed. 696; *Gormley v. Clark*, 134 U. S. 338, 10 S. C. Rep. 554, 33 L. Ed. 909; *Bennett v. Bennett*, *Deady*, 309, 311, Fed. Cas. No. 1318; *Merrill v. Dawson*, *Hempst.* 563, Fed. Cas. No. 9469; *Woodworth v. Spafford*, 2 McLean, 168, Fed. Cas. No. 18,020; *Jones v. Hays*, 4 McLean, 521, Fed. Cas. No. 7467; *Mewster v. Spalding*, 6 McLean, 24, Fed. Cas. No. 9513; *Gordon v. Hobart*, 2 Sum.

401, Fed. Cas. No. 5609; *Smith v. Tallapoosa*, 2 Woods, 574, Fed. Cas. No. 13,113; *Noonan v. Del. etc. R. R. Co.*, 68 Fed. 1; *Hathaway v. Mut. Life Ins. Co.*, 99 Fed. 534; *Beatrice v. Edmunson*, 117 Fed. 427, 54 C. C. A. 601. See *Finney v. Guy*, 189 U. S. 335, 23 S. C. Rep. 558; *Eastern B. & L. Ass'n v. Williamson*, 189 U. S. 122, 23 S. C. Rep. 527; *Course v. Stead*, 4 Dall. 27, n.; *Bird v. Commonwealth*, 21 Gratt. 800.

³⁷ *Lessee of Livingston v. Moore*, 7 Pet. 469, 542, 8 L. Ed. 751.

³⁸ *McNiel v. Holbrook*, 12 Pet. 84, 9 L. Ed. 1009; *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123; *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624; *Partridge v. Insurance Co.*, 15 Wall. 573, 580, 21 L. Ed. 227; *Lorman v. Clarke*, 2 McLean, 568, Fed. Cas. No. 8516.

³⁹ *Lamar v. Micou*, 114 U. S. 218, 5 S. C. Rep. 857, 29 L. Ed. 94; *Hanley v. Donoghue*, 116 U. S. 1, 6 S. C. Rep. 242, 29 L. Ed. 535.

pears that the courts of the United States have jurisdiction to administer a jurisprudence not wholly or chiefly within the domain of congress. They administer between the proper parties the jurisprudence of the states. They are governed like the state courts by the valid statutes of the state. Where no federal question is involved, they follow the decisions of the highest court of the state in its construction of its own constitution or other written laws.⁴⁰ But this rule does not apply where a federal question is involved, as where the case involves a contract made before the decision in the state court was rendered, or before the statute to be construed was passed.⁴¹

§ 314 (186). Interpretation of state and federal laws.—Marshall, C. J., has thus defined comprehensively the pri-

⁴⁰ *De Wolf v. Rabaud*, 1 Pet. 479, 476, 7 L. Ed. 227; *Harpending v. Dutch Church*, 16 Pet. 493, 455, 10 L. Ed. 1029; *Shelby v. Guy*, 11 Wheat. 361, 6 L. Ed. 495; *Smith v. Kernochan*, 7 How. 198, 12 L. Ed. 666; *Leffingwell v. Warren*, 2 Black, 599, 17 L. Ed. 261; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 530; *Christy v. Pridgeon*, 4 Wall. 196, 18 L. Ed. 322; *Gut v. State*, 9 Wall. 35, 19 L. Ed. 573; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Supervisors v. United States*, 18 Wall. 71, 81, 21 L. Ed. 771; *Tioga R. R. Co. v. Blossburg, etc. R. R. Co.*, 20 Wall. 137, 22 L. Ed. 331; *Elmwood v. Marcy*, 92 U. S. 289, 23 L. Ed. 710; *Townsend v. Todd*, 91 U. S. 452, 23 L. Ed. 413; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102; *Peik v. Chicago, etc. R. R. Co.*, 94 U. S. 164, 24 L. Ed. 97; *Adams v. Nashville*, 95 U. S. 19, 24 L. Ed. 369; *Stutsman County v. Wallace*, 142 U. S. 293, 12 S. C. Rep. 227, 35 L. Ed. 1018; *People v. Cook*, 148 U. S. 397, 13 S. C. Rep. 645; *Nobles v. Georgia*, 168 U. S. 398, 18 S. C. Rep. 87, 42 L. Ed. 515; *Covington v. Kentucky*, 173 U. S. 231, 19 S. C. Rep. 383, 43 L. Ed. 679; *Knights Templars & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197, 23 S. C. Rep. 108; *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 S. C. Rep. 126; *Manley v. Park*, 187 U. S. 547, 23 S. C. Rep. 208; *Schaeffer v. Werling*, 188 U. S. 516, 23 S. C. Rep. 449; *Travelers' Ins. Co. v. Oswego*, 59 Fed. 58, 7 C. C. A. 669, 19 U. S. App. 321; *Adams v. New York*, 192 U. S. 585; *Manhattan Life Ins. Co. v. Albro*, 127 Fed. 281, — C. C. A. —; *Dormidy v. Sharon Boiler Works*, 127 Fed. 485; *King v. Wilson*, 1 Dill. 555, Fed. Cas. No. 7810; *Union Horse Shoe Works v. Lewis*, 1 Abb. (U. S.) 518; *Coates v. Muse*, 1 Brock. 539; *Newman v. Keffer*, 1 Brunner, Col. Cas. 502. But mere dicta of the state courts are not binding on the federal courts. *Matz v. C. & A. R. R. Co.*, 85 Fed. 180.

⁴¹ *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334, 47 U. S. App. 36.

mary authority to interpret laws: "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on principles supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the constitution or treaties of the United States."⁴²

The federal courts will follow the latest settled adjudications.⁴³ They are called on to administer the laws of the states, and the states are not politically foreign to each other, though there is no connection between them in legislation; therefore those courts take notice of state laws when

⁴² *Elmendorf v. Taylor*, 10 Wheat. 152, 159, 6 L. Ed. 289; *Bell v. Morrison*, 1 Pet. 315, 351, 7 L. Ed. 174; *De Wolf v. Rabaud*, 1 Pet. 479, 7 L. Ed. 227; *Beach v. Viles*, 2 Pet. 675, 7 L. Ed. 559; *McCluny v. Sulliman*, 3 Pet. 270, 7 L. Ed. 676; *United States v. Morrison*, 4 Pet. 124, 7 L. Ed. 804; *Harpending v. Dutch Church*, 16 Pet. 493, 455, 10

L. Ed. 1029; *Shelby v. Guy*, 11 Wheat. 361, 6 L. Ed. 495; *Richmond v. Smith*, 15 Wall. 429, 21 L. Ed. 200.

⁴³ *Leffingwell v. Warren*, 2 Black, 599, 17 L. Ed. 261; *Gelpcke v. DuBuque*, 1 Wall. 175, 17 L. Ed. 530; *Kountze v. Omaha*, 5 Dill. 443, Fed. Cas. No. 7928.

they are officially published, and only when they are found in the official statute books of the state.⁴⁴ The construction given to federal statutes by the federal supreme court is binding upon the state courts.⁴⁵ But a state court may refuse to follow the construction of a state statute by the federal supreme court.⁴⁶

§ 315 (187). They adopt the local law of real property as ascertained by the decisions of the state courts, whether those decisions are grounded on the interpretation of statutes, or on unwritten law which has become a fixed rule of property in the state.⁴⁷ The power of the state to regulate the tenure of real property within her limits and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which testamentary disposition may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. The power of the state in

⁴⁴ *Ennis v. Smith*, 14 How. 400, 429, 14 L. Ed. 472.

⁴⁵ *Southern Ry. Co. v. Harrison*, 119 Ala. 589, 24 So. 552, 72 Am. St. Rep. 936, 43 L. R. A. 385; *Hazeltine v. Central National Bank*, 155 Mo. 66, 56 S. W. 895; *Board of Trustees v. Cuppett*, 52 Ohio St. 567, 40 N. E. 792; *First National Bank v. Chapman*, 9 Ohio C. C. 79; *Portland National Bank v. Scott*, 20 Ore. 421, 26 Pac. 276.

⁴⁶ *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86.

⁴⁷ *McKeen v. Delancy*, 5 Cranch, 22, 3 L. Ed. 25; *Polk's Lessee v. Wendall*, 9 Cranch, 87, 98, 3 L. Ed. 665; *Davis v. Mason*, 1 Pet. 503, 7 L. Ed. 239; *Waring v. Jackson*, 1 Pet. 570, 7 L. Ed. 266; *Inglis v. Trustees*,

3 Pet. 99, 127, 7 L. Ed. 617; *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79; *Ross v. McLung*, 6 Pet. 283, 8 L. Ed. 400; *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *Thatcher v. Powell*, 6 Wheat. 119, 127, 5 L. Ed. 221; *Daly v. Jones*, 8 Wheat. 495, 535, 5 L. Ed. 670; *Jackson v. Chew*, 12 Wheat. 153, 7 L. Ed. 583; *Porterfield v. Clark*, 2 How. 76, 11 L. Ed. 185; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 708; *Nichols v. Levy*, 5 Wall. 433, 18 L. Ed. 596; *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192; *Gormley v. Clark*, 134 U. S. 338, 10 S. C. Rep. 554, 33 L. Ed. 909; *Barker v. Jackson*, 1 Paine, 559, Fed. Cas. No. 989. See *Amy v. Watertown*, 130 U. S. 301, 9 S. C. Rep. 537, 32 L. Ed. 946.

this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the federal government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority.⁴⁸

§ 316 (188). **Foreign statutes, how proved.**—Though statutes have no extraterritorial operation, yet, by comity, foreign laws are recognized everywhere when shown for certain purposes; they materially affect the *status* and rights of persons born, married, divorced or domiciled; of persons who have entered into contracts, or have suffered wrong in the country where they are in force, for various purposes not necessary here to enumerate.⁴⁹

§ 317 (189). Foreign laws are taken into consideration on the principles of international law. All laws are foreign to every country in which they do not operate of their own vigor; they are foreign to every country or state lying outside of the territorial jurisdiction of the law-maker. The states of the American Union are foreign to each other in their legislation.⁵⁰ The principles of international law, however, apply with greater force between the people of the several states than between the subjects of foreign nations.⁵¹

The dismemberment or conquest of the enacting state will not render the laws in force foreign after the transfer to a new sovereign or jurisdiction.⁵²

⁴⁸ *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192; *McCormick v. Sullivant*, 10 Wheat. 192, 6 L. Ed. 300.

⁴⁹ *Story*, Conf. L., §§ 17-38; *Beard v. Basye*, 7 B. Mon. 144; *Whart. Conf. L.*, ch. V; *Heirn v. Bridault*, 37 Miss. 209; *Edgerly v. Bush*, 81 N. Y. 199; *Trasher v. Everhart*, 3 Gill & J. 234; *Dennick v. Central R. R. Co.*, 103 U. S. 11, 26 L. Ed. 439;

Kline v. Baker, 99 Mass. 253; *Mitchell v. Wells*, 37 Miss. 235.

⁵⁰ *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179.

⁵¹ *Shaw v. Brown*, 35 Miss. 246.

⁵² *Stokes v. Macken*, 62 Barb. 145; *State v. Patterson*, 2 Ired. L. 346, 88 Am. Dec. 699; *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423; *Calkin v. Cocke*, 14 How. 227, 14 L. Ed. 398; *Fremont v. United States*, 17

§ 318 (190). Foreign statutes have to be proved as matter of fact.⁵³ This follows necessarily from the court not taking judicial notice of them, and from their having effect only by comity on the principles of the common law.⁵⁴ Statutes are records, and by the common law have to be proved as such by an examined and sworn copy, or by exemplification.⁵⁵ The public seal of the state, affixed to the exemplification of a law, proves itself. It is a matter of notoriety, and will be taken notice of as part of the law of nations acknowledged by all.⁵⁶

How. 542, 557, 15 L. Ed. 241; *Brice v. State*, 2 Overt. 254; *Egnew v. Cochrane*, 2 Head, 329; *Doe v. Es-lava*, 11 Ala. 1028; *Cucullu v. Louisiana Ins. Co.*, 5 Mart. (N. S.) (La.) 613, 16 Am. Dec. 199; *United States v. Turner*, 11 How. 663.

⁵³ *McKenzie v. Wardwell*, 61 Me. 136; *Kline v. Baker*, 99 Mass. 253; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Dyer v. Smith*, 12 Conn. 384; *Lockwood v. Crawford*, 18 id. 361; *Brush v. Scribner*, 11 id. 407, 29 Am. Dec. 303; *Tuten v. Gazan*, 18 Fla. 751; *Consequa v. Willings*, 1 Pet. C. C. 225, 229, Fed. Cas. No. 3128; *Owen v. Boyle*, 15 Me. 147, 82 Am. Dec. 143; *Charlotte v. Chouteau*, 33 Mo. 194; *Diez*, In re, 56 Barb. 591; *Bryant v. Kelton*, 1 Tex. 434; *Hazelton v. Valentine*, 113 Mass. 472; *Ely v. James*, 123 id. 36; *Trasher v. Everhart*, 3 Gill & J. 234; *Bock v. Lauman*, 24 Pa. St. 435; *Ingraham v. Hart*, 11 Ohio, 255; *Cecil Bank v. Barry*, 20 Md. 287, 83 Am. Dec. 553; *Hemphill v. Bank of Ala.*, 6 S. & M. 44; *Harris v. White*, 81 N. Y. 532; *Holmes v. Broughton*, 10 Wend. 75, 25 Am. Dec. 536; *Marcy v. Howard*, 91 Ala. 133, 8 So. 566; *Cummings v. Mon-*

tague, 116 Ga. 457, 42 S. E. 732; *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461; *Mansur-Tibbetts Implement Co. v. Willet*, 10 Okl. 383, 61 Pac. 1066; *Howe v. Ballard*, 113 Wis. 375, 89 N. W. 136; *Leathe v. Thomas*, 109 Ill. App. 434; *Southern Ill. & Mo. Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453.

⁵⁴ *Bock v. Lauman*, 24 Pa. St. 435, 445.

⁵⁵ 1 Whart. Ev., §§ 94, 95, 309; *Story's Conf. L.*, § 641; *Bailey v. McDowell*, 2 Harr. 34; *Church v. Hubbard*, 2 Cranch, 237, 2 L. Ed. 249; *Stewart v. Swanzy*, 23 Miss. 502; *Warner v. Commonwealth*, 2 Va. Cas. 95; *Owen v. Boyle*, 15 Me. 147, 82 Am. Dec. 143; *Lincoln v. Battelle*, 6 Wend. 475; *Zimmerman v. Helser*, 32 Md. 274; *Ennis v. Smith*, 14 How. 400, 426-429, 14 L. Ed. 472; *Lacon v. Higgins*, 3 Stark. 178; *Jones v. Maffet*, 5 S. & R. 523; *Baltimore, etc. R. R. Co. v. Glenn*, 28 Md. 287, 92 Am. Dec. 688; *Nashua Sav. Bank v. Anglo-Am. Land, Mtg. & Agency Co.*, 189 U. S. 221, 23 S. C. Rep. 517.

⁵⁶ *Robinson v. Gilman*, 20 Me. 299; *Lincoln v. Battelle*, 6 Wend. 475;

The proof should be made on the trial; foreign statutes cannot be first produced in the appellate court.⁵⁷ Foreign laws which have been promulgated as such by our government,⁵⁸ or officially procured pursuant to statute for judicial reference or evidentiary purposes,⁵⁹ may be read in evidence without other verification. A printed volume of foreign laws proved by witnesses to contain the statutes of a foreign state or country, or to have received in the home country the sanction of the executive and judicial officers as containing its laws, is admissible.⁶⁰ The proof of foreign laws has been facilitated by statutes in the different states by making publications purporting to be by authority self-proving.⁶¹ Congress has provided a mode of proof,⁶² and such proof is sufficient though the state statute may require more,⁶³ but it is not exclusive of other methods.⁶⁴ The written laws of a foreign state cannot be proven by parol testimony.⁶⁵

Norris' Peake (ed. 1824 from 5th London ed. 109, 110, note); Henry v. Adey, 3 East, 222; U. S. v. Johns, 4 Dall. 412, 416.

⁵⁷ Munroe v. Guillaume, 3 Keyes, 30; Belleville S. Bank v. Richardi, 56 Mich. 453.

⁵⁸ Talbot v. Seeman, 1 Cranch, 38, 2 L. Ed. 15; Flanigen v. Washington Ins. Co., 7 Pa. St. 306.

⁵⁹ Cox v. Robinson, 2 Stew. & Port. 96; Biddis v. James, 6 Binn. 321; Munroe v. Guillaume, 3 Keyes, 30.

⁶⁰ Owen v. Boyle, 15 Me. 147, 82 Am. Dec. 143; Burton v. Anderson, 1 Tex. 93; Lacon v. Higgins, 3 Stark. 178; Herschfeld v. Dixel, 12 Ga. 582; Emery v. Berry, 28 N. H. 486, 61 Am. Dec. 622; Foster v. Taylor, 2 Overt. 190; Sussex Peerage Case, 11 Cl. & Fin. 85; Barrows v. Downs, 9 R. I. 447, 11 Am. Rep. 283; Dalrymple v. Dalrymple, 2

Hagg. Consist. R. 81; Jones v. Maffet, 5 S. & R. 528; Brush v. Wilkins, 4 Johns. Ch. 506; People v. Calder, 30 Mich. 87.

⁶¹ Cummins v. State, 12 Tex. App. 121; Ellis v. Wiley, 17 Tex. 134; May v. Jameson, 11 Ark. 368; Dixon v. Thatcher, 14 id. 141; Foster v. Taylor, 2 Overt. 190; Allen v. Watson, 2 Hill (S. C.), 319; Smoot v. Fitzhugh, 9 Port. 72; Clanton v. Barnes, 50 Ala. 260; Biddis v. James, 6 Binn. 321; Hollister v. McCord, 111 Wis. 538, 87 N. W. 435

⁶² Sec. 905, R. S. U. S.

⁶³ Ansley v. Meikle, 81 Ind. 260; Uhler v. Semple, 20 N. J. Eq. 288.

⁶⁴ Poindexter v. Barker, 2 Hayw 173; Thompson v. Musser, 1 Dall 402; Hanrick v. Andrews, 9 Port 9; Smoot v. Fitzhugh, 9 Port. 72; Wilson v. Smith, 5 Yerg. 379.

⁶⁵ Johnson v. Heaser, 61 Neb. 631, 85 N. W. 894.

In *Taylor v. Bank of Illinois*⁶⁶ the court reached the conclusion in which the authorities generally agree: "If certified according to the act of congress they *must* be admitted, and if certified or authenticated according to state provisions they may be admitted without contravening the laws of the Union." The foreign unwritten law, and the construction of statutes may be proved by parol — by expert witnesses.⁶⁷

§ 319 (191). A decision of the highest judicial tribunal of a foreign state construing one of its statutes is to be received elsewhere as an authoritative exposition.⁶⁸ Nor is its weight or authority affected by the fact that it was made after the occurrence of the transaction in question, or after the departure from the state of the person affected by it.⁶⁹ A foreign statute similar to a domestic statute will be

⁶⁶ 7 T. B. Mon. 576. But see *State v. Twitty*, 2 Hawkes, 441, 11 Am. Dec. 779.

⁶⁷ *Walker v. Forbes*, 31 Ala. 9; *Dyer v. Smith*, 12 Conn. 384; *People v. Calder*, 30 Mich. 85; *People v. Lambert*, 5 id. 349; *Consolidated, etc. Co. v. Cashow*, 41 Md. 59; 1 Whart. on Ev., §§ 305-308; *Roberts' Will, Matter of*, 8 Paige, 446; *Vander Donckt v. Thelluson*, 8 C. B. 812; *Merrifield v. Robbins*, 8 Gray, 150; *Woodstock v. Hooker*, 6 Conn. 35; *Hale v. N. J. St. Nav. Co.*, 15 id. 539, 39 Am. Dec. 398; *Emery v. Berry*, 28 N. H. 453, 61 Am. Dec. 622; *Bristow v. Sequeville*, 5 Exch. 275; *Kenny v. Clarkson*, 1 John. 385, 3 Am. Dec. 336; *Tyler v. Trabue*, 8 B. Mon. 306; *Baltimore, etc. R. R. Co. v. Glenn*, 28 Md. 287, 92 Am. Dec. 638; *Wilson v. Carson*, 12 Md. 54.

⁶⁸ *Fowler v. Lamson*, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; *Van Matre v. Sankey*, 148 Ill. 536,

36 N. E. 628, 39 Am. St. Rep. 196; *Wannamaker v. Poorbaugh*, 91 Ill. App. 560; *Johnson v. State*, 91 Ala. 70, 9 So. 71; *Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529; *Supreme Council v. Green*, 71 Md. 263, 17 Atl. 1048, 17 Am. St. Rep. 527; *Brown v. St. Croix Lumber Co.*, 44 Minn. 348, 46 N. W. 570.

⁶⁹ *Bloodgood v. Grasey*, 31 Ala. 575; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289; *Shelby v. Guy*, 11 Wheat. 367, 6 L. Ed. 495; *McRae v. Mattoon*, 13 Pick. 53; *Sidney v. White*, 12 Ala. 728; *Raynham v. Canton*, 3 Pick. 293; *Mutual Ass. Society v. Watts*, 1 Wheat. 279, 4 L. Ed. 91; *Polk v. Wendal*, 9 Cr. 87, 3 L. Ed. 665; *Penobscot R. R. v. Bartlett*, 13 Gray, 244, 71 Am. Dec. 753; *Cragin v. Lamkin*, 7 Allen, 395; *Blanchard v. Russell*, 13 Mass. 1, 7 Am. Dec. 106; *Botanic Med. College v. Atchinson*, 41 Miss. 188; *Saul v. His Creditors*, 5 Martin

presumed to have the same construction as the domestic statute, in the absence of evidence to the contrary.⁷⁰

§ 320 (192). **The functions of the court and jury in regard to foreign laws.**—Foreign statutes, though to be proved as facts, do not necessarily require a jury to determine the question of their existence.⁷¹ If proved by a sworn

(N. S.), 569, 16 Am. Dec. 212; *McKeen v. De Lancy*, 5 Cr. 22, 3 L. Ed. 25; *Gardner v. Collins*, 2 Pet. 85, 7 L. Ed. 347; *United States v. Morrison*, 4 Pet. 124, 7 L. Ed. 804; *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120; *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *Walker v. Forbes*, 31 Ala. 9; *Davidson v. Sharpe*, 6 Ired. 14; *Inge v. Murphy*, 10 Ala. 885; *Peake v. Yeldell*, 17 Ala. 636; *Hanrick v. Andrews*, 9 Port. 9; *American P. W. v. Lawrence*, 23 N. J. L. 590, 17 Am. Dec. 420; *Johnston v. Bank*, 3 Strob. Eq. 263; *Powell v. De Blane*, 23 Tex. 66. See *Peck v. Pease*, 5 McLean, 486, Fed. Cas. No. 10,894; *Dwight v. Richardson*, 12 S. & M. 325; *Humphreyville Cop. Co. v. Sterling*, 1 Brun. Col. Cas. 3.

⁷⁰ *Howe v. Ballard*, 113 Wis. 375, 89 N. W. 136. And a foreign statute will be construed according to the rules and principles applied in the state of the forum. *Tuttle v. National Bank*, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750.

⁷¹ *Bock v. Lauman*, 24 Pa. St. 435. *Lowrie, J.*, said: "Are we excluded from looking at the laws of another state where they have not been found as a matter of fact? We think not. The rule of international law, shortly expressed in the maxim *locus regit actum*, is a part of our law, and it requires us to go

abroad for the law by which the efficacy of this contract is to be tested. That rule acquired an increase of sanction by the union of the states; it is involved in the constitutional declaration that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state;' it receives at least a partial expression in the judiciary act of 1789, section 34, declaring that the laws of the several states should be taken as rules of decision in the United States courts in cases where they apply; and many clauses of the constitution cannot have their full effect as laws unless we take judicial notice of the institutions of sister states.

"It is commonly said that foreign law is matter of fact, and so generally it is, but not necessarily to be found by the jury. If a state law comes to us certified under the seal of the state, it comes to us as a fact in the first instance; but then we need no jury to establish its existence and its character. There may very often be cases in which a jury is necessary for this purpose, but our knowledge is not necessarily dependent on their verdict." See *Barkman v. Hopkins*, 6 Eng. (Ark.) 157.

copy, doubtless the evidence would go to a jury.⁷² But if proved by an exemplification, or by reading from a book published by authority, the court would decide not only the admissibility but the effect of the proof.⁷³ The home construction of a foreign statute is provable by parol, and if so proved as a fact is to be found by a jury.⁷⁴ The published official reports of decisions showing such home construction are held to be admissible evidence.⁷⁵ When the evidence admitted consists entirely of a statute or judicial opinions, the question of construction and effect is for the court alone.⁷⁶ The supreme court of the United States has recently expressed itself as follows on this subject: "Although the law of a foreign jurisdiction may be proved as a fact, yet the evidence of a witness stating what the law of the foreign jurisdiction is, founded upon the terms of a statute, and the decisions of the court thereon as to its meaning and effect, is really a matter of opinion although proved as a fact, and courts are not concluded thereby from themselves

⁷² Id.

⁷³ Id.; Willard v. Conduit, 10 Tex. 213.

⁷⁴ Kline v. Baker, 99 Mass. 253; Holman v. King, 7 Met. 384; Dyer v. Smith, 12 Conn. 384; Moore v. Gwynn, 5 Ired. 187; Ingraham v. Hart, 11 Ohio, 255; Baltimore, etc. R. R. Co. v. Glenn, 28 Md. 323, 92 Am. Dec. 688; Consolidated, etc. Co. v. Cashow, 41 Md. 60; Wilson v. Carson, 12 id. 54; Bristow v. Sequeville, 5 Ex. 275 and note; Penobscot, etc. R. R. Co. v. Bartlett, 12 Gray, 244, 71 Am. Dec. 753; Ames v. McCamber, 124 Mass. 85, 70 Am. Rep. 468; Craigin v. Lamkin, 7 Allen, 395; De Sobry v. De Laistre, 2 Har. & J. 191, 229. See Gardner v. Lewis, 7 Gill, 377.

⁷⁵ Charlotte v. Chouteau, 33 Mo. 194; Kingsley v. Kingsley, 20 Ill. 203; Kline v. Baker, 99 Mass. 253;

Andrews v. Hoxie, 5 Tex. 171; McDeed v. McDeed, 67 Ill. 548. *Contra*, Gardner v. Lewis, 7 Gill, 377.

⁷⁶ Kline v. Baker, 99 Mass. 253; Ely v. James, 123 id. 36; Hale v. New J. St. Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Lockwood v. Crawford, 18 Conn. 361; Charlotte v. Chouteau, 33 Mo. 194; Cecil Bank v. Barry, 20 Md. 287, 83 Am. Dec. 553; People v. Lambert, 5 Mich. 349; Inge v. Murphy, 10 Ala. 885, 897; Sidwell v. Evans, 1 Pen. & W. 383, 388; De Sobry v. Le Laistre, 2 Har. & J. 191; Ennis v. Smith, 14 How. 400, 14 L. Ed. 472; Church v. Hubbard, 2 Cranch, 187, 2 L. Ed. 249; Di Sora v. Phillips, 10 H. L. Cas. 624; Bremer v. Freeman, 10 Moore, P. C. 306; Owen v. Boyle, 15 Me. 147, 82 Am. Dec. 143; Warnick v. Grosholz, 3 Grant's Cases, 234.

consulting and construing the statutes and decisions which have been themselves proved, or from deducing a result from their own examination of them that may differ from that of a witness upon the same matter. In other words, statutes and decisions having been proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is, without being conclusively bound by the testimony of a witness who gives his opinion as to the law, which he deduces from those very statutes and decisions. . . . This right and duty of the courts to themselves construe the statutes and decisions are not altered because the law of the foreign state and the various decisions of its courts are alleged to be as set forth in a pleading which is demurred to instead of being proved on a trial. In this case the statutes, together with references to the decisions of the state courts, are given in the complaint, and the pleader, by making an averment in the form of a fact, assumes to give a meaning to them such as he thinks to be correct, but the duty still remains with the courts to themselves determine from those statutes and decisions what is in truth the law of the foreign jurisdiction."⁷⁷ If a foreign statute be proved, but no evidence given of any peculiar home construction, the court will construe it by the settled rules of construction, or as similar statutes of the state where the court sits are construed.⁷⁸ The construction of a foreign statute does not make a federal question so as to give the federal courts jurisdiction of a case wherein such construction is involved.⁷⁹

⁷⁷ *Finney v. Guy*, 189 U. S. 335, 23 S. C. Rep. 558. To same effect, *Eastern B. & L. Ass'n v. Williamson*, 189 U. S. 122, 23 S. C. Rep. 527.

⁷⁸ *Smith v. Bartram*, 11 Ohio St. 690; *Smith v. Mason*, 44 Neb. 610, 63 N. W. 41; *Fisher v. Donovan*, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383; *Greenville National Bank v.*

Evans-Snyder-Buel Co., 9 Okl. 353, 60 Pac. 249; *Osborn v. Blackburne*, 78 Wis. 209, 47 N. W. 175, 23 Am. St. Rep. 400, 10 L. R. A. 367; *Slaughter v. Bernards*, 88 Wis. 111, 59 N. W. 576; *Hyde v. German National Bank*, 115 Wis. 170, 91 N. W. 230.

⁷⁹ *Glenn v. Garth*, 147 U. S. 360,

§ 321 (193). **Private statutes.**—A general or public statute is a universal rule that regards the whole community; is of public concern; the courts take judicial notice of it. On the other hand, private statutes operate only on particular persons and private concerns; the courts do not take notice of them without proof; when relied on they have to be pleaded and proved.⁸⁰ Acts may be local and special, immediately designed to effect only a part of the territory or people under the jurisdiction of the law-making power, and temporary in duration, and yet be public because being intended for a public object.⁸¹ Thus, acts for the establishment of a local government, a village or city, being for public purposes;⁸² or fixing or amending the boundaries of a city or county;⁸³ establishing or changing the county seat;⁸⁴ to organize corporations for canals, railroads or turnpikes, when they contain provisions affecting the general public;⁸⁵ or

13 S. C. Rep. 350, 37 L. Ed. 203; *Lloyd v. Matthews*, 155 U. S. 222, 15 S. C. Rep. 70, 39 L. R. A. 128; *Banholzer v. N. Y. Life Ins. Co.*, 178 U. S. 402, 20 S. C. Rep. 972, 44 L. Ed. 1124; *Johnson v. N. Y. Life Ins. Co.*, 187 U. S. 491, 23 S. C. Rep. 194.

⁸⁰ 1 Black. Com. 86; *People v. Wright*, 70 Ill. 388; *State v. Chambers*, 93 N. C. 600; *Meshke v. Van Doren*, 16 Wis. 319; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky 89, 17 S. W. 212, 13 L. R. A. 668; *State v. Haddonfield & C. Turnpike Co.*, 65 N. J. L. 97, 46 Atl. 700; *Denver & R. G. R. R. Co. v. United States*, 9 N. M. 389, 54 Pac. 336; *Corporation Commission v. Seaboard Air Line System*, 127 N. C. 283, 37 S. E. 266.

⁸¹ *Unity v. Burrage*, 103 U. S. 447, 26 L. Ed. 405; *Allen v. Hirsch*, 8 Ore. 412; *Burnham v. Acton*, 35 How. Pr. 48; 1 Kent's Com. 459;

City of Covington v. Voskotter, 80 Ky. 219; *Powers v. Commonwealth*, 90 Ky. 167, 13 S. W. 450.

⁸² *People v. Wright*, 70 Ill. 388; *Clark v. Janesville*, 10 Wis. 136; *Mason v. Mulholn*, 6 Dana, 140; *Pierce v. Kimball*, 9 Me. 54, 56; *Halbert v. Skyles*, 1 A. K. Marsh. 369; *Van Swartow v. Commonwealth*, 24 Pa. St. 131; *Burnham v. Webster*, 5 Mass. 266; *Ellis v. Commissioners*, 2 Gray, 378; *Burhop v. Milwaukee*, 21 Wis. 257. See *King v. Burrage*, 3 P. Wms. 496; *Gorham v. Springfield*, 21 Me. 58; *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423.

⁸³ *Commonwealth v. Springfield*, 7 Mass. 12; *Stephenson v. Doe*, 8 Blackf. 508; *New Portland v. New Vineyard*, 16 Me. 69; *West v. Blake*, 4 Blackf. 234; *State v. Jackson*, 39 Me. 291; *Ross v. Reddick*, 2 Ill. 73.

⁸⁴ *State ex rel. v. Lean*, 9 Wis. 279.

⁸⁵ *Jenkins v. Union Turnpike Co.*, 1 Cai. Cases, 86; *Proprietors of Frye-*

authorizing particular municipalities to contribute aid for such enterprises,⁸⁶—are, in this country, public acts. Here the tendency has been to enlarge the limits of public statutes, and to bring within them all enactments of a general character, or which in any way affect the community at large.⁸⁷

An act authorizing a named person to construct a dam of a particular description for the purpose of improving the navigation of a river is a public statute.⁸⁸ Acts for the incorporation of banks have been held public by reason of provisions affecting the general public,⁸⁹ and other corporations.⁹⁰ A penal act is public;⁹¹ and the defining of an offense in an act otherwise private renders it a public act.⁹² An act authorizing a foreign private corporation to do business, and providing that it shall have an office and place of business in the state where the law is passed, and that such corporation may then sue and be sued like a domestic corporation, is a public act.⁹³ The distinction between public and private acts defined in the common law of England by

burg Canal v. Frye, 5 Me. 38; Att'y-General v. Erie, etc. R. R. Co., 55 Mich. 21.

⁸⁶ Unity v. Burrage, 103 U. S. 447, 26 L. Ed. 405. See Clark v. Janesville, 10 Wis. 136.

⁸⁷ Unity v. Burrage, 103 U. S. 447, 26 L. Ed. 405; Boyle, In re, 9 Wis. 264; Yellow R. Improv't Co. v. Arnold, 46 Wis. 214; State v. Chambers, 93 N. C. 600; Price v. White, 27 Mo. 275; Bretz v. Mayor, etc., 6 Rob. 325; McLain v. Mayor, etc., 3 Daly, 32; West v. Blake, 4 Blackf. 234; Bevans v. Baxter, 23 Ark. 387; State v. Judges, 21 Ohio St. 1; Kerrigan v. Force, 9 Hun, 185; Wright v. Hawkins, 28 Tex. 452.

⁸⁸ Calking v. Baldwin, 4 Wend. 667.

⁸⁹ Smith v. Strong, 2 Hill, 241;

Louisiana State Bank v. Flood, 3 Mart. (N. S.) 341; Bank of Commonwealth v. Spilman, 3 Dana, 150; Young v. Bank of Alexandria, 4 Cr. 384, 2 L. Ed. 655; Bank of Utica v. Smedes, 3 Cow. 634; Bank of Newberry v. Railroad Co., 9 Rich. 495.

⁹⁰ Portsmouth Livery Co. v. Watson, 10 Mass. 91.

⁹¹ Burnham v. Acton, 35 How. Pr. 48.

⁹² Bacon's Abr., tit. Statutes, F.; Heridia v. Ayers, 12 Pick. 344; Burnham v. Webster, 5 Mass. 266; Young v. Bank of Alexandria, 4 Cr. 384, 2 L. Ed. 655; Rogers' Case, 2 Greenlf. 303; Rex v. Buggs, Skin. 428.

⁹³ Fall Brook Coal Co. v. Lynch, 47 How. Pr. 520.

Blackstone is not quite the distinction recognized in this country. Here acts may be public though they are local and special, when they concern the public generally, though more particularly a local community or only a class of the general public — where they concern the class in distinction from the individual.⁹⁴ Where a statute of a private nature is declared to be a public act, it will be treated as such and need not be pleaded nor proved.⁹⁵ A statute amendatory of a public law is public.⁹⁶ And where a general law recognized and amended a private or special law, it was held that the court would take judicial notice of the latter law.⁹⁷ A private act may contain provisions of a public nature and such provisions need not be pleaded or proved.⁹⁸

§ 322 (194). A private statute is one confined to a special case.⁹⁹ An act “to enable the Bishop of Canton to make a lease to A. B.” for an exceptional period is a fair example of a private statute.¹ A statute enabling the local authorities of a particular city or county to raise money by tax for the payment of certain claims against it,² or relieving a particular married woman by name of the disabilities of coverture;³ acts authorizing the sale of property of minors and other persons under disability,⁴ are private. Acts for the mere

⁹⁴ *Commonwealth v. Worcester*, 3 Pick. 473; *Wales v. Belcher*, id. 508; *Bish. W. L.*, § 42c; *Wheeler v. Philadelphia*, 77 Pa. St. 338.

⁹⁵ *Brookville Ins. Co. v. Records*, 5 Blackf. 170; *Beaty v. Knowler*, 4 Pet. 152, 7 L. Ed. 813; *Covington Drawbridge Co. v. Shepherd*, 20 How. 232; *Bacon's Abr.*, Statute, F. See *Edinburgh R. R. v. Wauchope*, 8 Cl. & F. 710; *Rogers' Case*, 2 Greenlf. 303; *State v. Frazier*, 98 Mo. 426, 11 S. W. 973.

⁹⁶ *Unity v. Burrage*, 103 U. S. 447, 26 L. Ed. 405; *State v. Welch*, 21 Minn. 22.

⁹⁷ *Albion v. Maple Lake*, 71 Minn. 503, 74 N. W. 282.

⁹⁸ *State v. Barringer*, 110 N. C. 525, 14 S. E. 781.

⁹⁹ *Whart. Com. on Amer. Law*, §§ 13, 598.

¹ 1 Black. Com. 86.

² *Bretz v. Mayor, etc.*, 3 Abb. Pr. (N. S.) 478. See *Sherman Co. v. Simons*, 109 U. S. 735, 3 S. C. Rep. 502, 27 L. Ed. 1093.

³ *Ashford v. Watkins*, 70 Ala. 156.

⁴ *Rice v. Parkman*, 16 Mass. 326; *Moore v. Maxwell*, 18 Ark. 469; *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502; *McComb v. Gilkey*, 29 Miss. 146; *Wilkinson v. Leland*, 2 Pet. 657, 7 L. Ed. 542; *Lessee of Dulany v. Tilghman*, 6 Gill & J. 461; *Croxall v. Shererd*, 5 Wall. 268, 18 L. Ed. 572;

creation of a private corporation are of this character.⁵ And it is held to make no difference that the charter contains provisions of a public nature or that the state is a large stockholder.⁶

The recital of facts in a private statute is strong evidence against those who obtained the act,⁷ but is not evidence against strangers,⁸ nor are such statutes binding on strangers.⁹ They may be avoided for fraud.¹⁰ An act may be in

Jackson v. Catlin, 2 John. 248; *Munford v. Pearce*, 70 Ala. 452; *Carroll v. Lessee of Olmsted*, 16 Ohio, 251; *Stewart v. Griffith*, 33 Mo. 13, 82 Am. Dec. 148; *Estep v. Hutchinson*, 14 S. & R. 435; *Davison v. Johnnot*, 7 Met. 388; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159; *Williamson v. Suydam*, 6 Wall. 723, 18 L. Ed. 967; *Lobrano v. Nelligan*, 9 Wall. 295, 19 L. Ed. 694; *Brevort v. Grace*, 53 N. Y. 245; *Leggett v. Hunter*, 19 id. 445; *Tharp v. Fleming*, 1 Houston, 580; *Perry v. Newsom*, 1 Ired. Eq. 28; *Todd v. Flournoy's Heirs*, 56 Ala. 99, 28 Am. Rep. 758; *Pickett v. Pipkin*, 64 Ala. 520; *Tindal v. Drake*, 60 id. 170. See *Watson v. Oates*, 58 Ala. 647; *Heirs of Holman v. Bank of Norfolk*, 12 Ala. 369.

⁵ *Burhop v. Milwaukee*, 21 Wis. 257; *Perry v. New Orleans R. R. Co.*, 55 Ala. 413, 28 Am. Rep. 740; *Conley v. Columbus, etc. R. R. Co.*, 44 Tex. 579; *Montgomery v. Plank R. Co.*, 31 Ala. 76; *Drake v. Flewellen*, 33 id. 106; *Clarion Bank v. Gruber*, 87 Pa. St. 468; *Timlow v. Railroad Co.*, 99 id. 284; *Perdicaris v. Bridge Co.*, 29 N. J. L. 367; *Butler v. Robinson*, 75 Mo. 192; *Mandere v. Bon-signore*, 28 La. Ann. 415; *Carrow v. Bridge Co.*, Phil. L. (N. C.) 118.

⁶ *Durham v. Richmond & D. R.*

Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1.

⁷ *May's Heirs v. Frazee*, 4 Litt. 392; *Elmendorff v. Carmachael*, 3 id. 472; *Powers v. Bergen*, 6 N. Y. 358; *Campbell's Case*, 2 Bland's Ch. 209.

⁸ *Id.*

⁹ *Earl of Shrewsbury v. Scott*, 6 C. B. (N. S.) 1, 157, 184; *Crittenden v. Wilson*, 2 Cow. 165; 2 Kent's Com. 466; *Jackson v. Catlin*, 2 John. 248; S. C., 8 id. 520; *McKinnon v. Bliss*, 21 N. Y. 206; *Lucy v. Levington*, 1 Vent. 175; *Jones v. Tatham*, 20 Pa. St. 398.

¹⁰ *Campbell's Case*, 2 Bland's Ch. 209; *Penn v. Baltimore*, 1 Ves.-Sr. 454; *Partridge v. Dorsey*, 3 Har. & J. 307, note; *Commonwealth v. Breed*, 4 Pick. 460. *Bland, Chan.*, in *Campbell's Case*, said: "A private act of parliament, although strictly and literally followed, as regards the authority and jurisdiction conferred (*Ex parte King*, 2 Bro. C. C. 158; *Ex parte Bolton School*, 2 Bro. C. C. 662; 2 Madd. Chan. 719), is in many respects considered and construed as a mere legal conveyance; in general binding only on those who are parties to it; that is, those who petition for it or are named in the act itself and those claiming under them.

part public and in part private.¹¹ The courts do not take judicial notice of private statutes.¹² They have to be proved in the usual manner.¹³ But in England by virtue of a statute, and in some of the states of the Union, all acts are public, and the courts take notice of them.¹⁴ And under the prevalent constitutional prohibition of special and local legislation, the distinction between public and private acts has lost much of its importance.

§ 323. **Miscellaneous cases.**—The supreme court of the United States, in a recent case, says that “wherever, by the express language of an act of congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice.”¹⁵ A joint resolution of the legislature will be noticed the same as a public act.¹⁶ It has been held that the president’s proclamation of amnesty, issued December 25, 1868, has the force of a public law and that the courts will take notice of the same.¹⁷

The Case of the Chancellor of Oxford, 10 Coke, 57; Hasketh v. Lee, 2 Saund. 84; Boulton v. Bull, 2 H. Bl. 499; Perchard v. Heywood, 8 T. R. 472; Wallwyn v. Lee, 9 Ves. 25; Bullock v. Fladgate, 1 Ves. & Bea. 471; Vauxhall Bridge Co. v. Earl Spencer, 2 Mad. 356; S. C., 4 Cond. Ch. 28; Edwards v. Grand Junction R. R. Co., 10 id. 85; Moore v. Usher, id. 107; 2 Black. Com. 344; Cru. Dig., tit. 33. It is never permitted to affect strangers or to defeat the rights of *bona fide* purchasers for a valuable consideration; because, as to strangers, a private act is considered only in

the light of a private conveyance. Pomfret v. Windsor, 2 Ves. 480.”

¹¹ Dwarries on St. 354; People v. Supervisors, 43 N. Y. 10.

¹² 1 Black. Com. 86.

¹³ Leland v. Wilkinson, 6 Pet. 317, 8 L. Ed. 412.

¹⁴ 13 and 14 Vic., ch. 21.

¹⁵ Caha v. United States, 152 U. S. 211, 222, 14 S. C. Rep. 513, 38 L. Ed. 415. Compare United States v. Bedgood, 49 Fed. 54.

¹⁶ McCarver v. Herzberg, 120 Ala. 523, 25 So. 3.

¹⁷ Jenkins v. Collard, 145 U. S. 546, 12 S. C. Rep. 868, 36 L. Ed. 812.

CHAPTER XI.

CLASSIFICATION AND DESCRIPTION OF STATUTES.

§ 324 (195). **The names of statutes.**—In the preceding pages we have discussed the general nature, enactment, duration and proof of statutes and cognate topics. We have now to discuss the principles by which is determined their meaning and effect. These principles are adapted to the peculiar nature of the statute; therefore, a chapter explaining the different kinds of statutes, with the names by which they are designated, will naturally precede the exposition of the principles which diversify and make up the law of hermeneutics. Some of these statutes have already been defined, but it will be useful to present them with others in one comprehensive view. They bear names significant of their origin, form or intrinsic nature. Many by name and operation are in dual contrast or contradistinction. English statutes, in part entering into our jurisprudence and in part foreign, are distinguished as *ancient* and *modern*. In our system we have federal, state, colonial and territorial statutes. A generical classification of all statutes is as public or private. The former are divided into species of *general* and *local* or *special* statutes. General statutes are further divided by other distinctions. In respect to duration they are *temporary* or *perpetual*; in respect to their force with reference to the date of taking effect, *prospective* or *retroactive*; as to the nature of their operation, *declaratory*, *permissive*, *prohibitive*, *preceptive*, *remedial*, *directory*, *mandatory* or *repealing* statutes; as to form, *affirmative* or *negative*. Another large and important class of public statutes is designated as *penal*.

§ 325 (196). **Ancient statutes of England.**—The statutes termed ancient are those adopted in Latin and French

prior to the reign of Edward III., which commenced in 1327.¹ Since that time they are contradistinguished as *nova statuta*, and since the accession of Richard III., 1483, the statutes have been first printed in English, and entirely so since the time of Henry VII.² Until late in the reign of Edward III., oral proceedings in the courts were conducted in the French language, "a tongue much unknown in the realm," and the pleadings and record in Latin. In the thirty-sixth year of his reign the proceedings were required to be conducted in English, and by the same statute the pleadings and record continued in Latin.

Formerly the judges formulated the statutes from the petition of the commons and the king's answer.³ All those passed at one session of parliament were strung together, making so many *capitula* or chapters of one statute; to which was usually prefixed a memorandum of the time and place of the meeting of parliament, and the occasion for calling it.⁴ On account of the generality or brevity of ancient statutes, a very liberal and latitudinary construction was practiced and held to be justifiable,⁵ not admitted of new or modern statutes.⁶ Hence, there is a wide distinction between the construction of ancient and modern statutes. This consideration should detract from the force of rules of interpretation which originated in reasons peculiar to the administration of ancient statutes, and originating in the forms of legislation then in vogue and now

¹ Dwarrris (2d ed.), 460.

⁴ Dwarrris, 460.

² Id.

⁵ 2 Inst. 401; Gwynne v. Burnell,

³ Mills v. Wilkins, 6 Mod. 62; Attorney-General v. Weymouth, 1 Amb. 22; Rex v. Williams, 1 W. Bl. 93; Morant v. Taylor, 1 Ex. D. 194; Shrewsbury v. Scott, 6 C. B. (N. S.) 1; Jeffreys v. Boosey, 4 H. L. 982; Chance v. Adams, 1 Lord Raym. 77; Hadden v. Collector, 5 Wall. 110, 18 L. Ed. 518; Bac. Abr., Court of Parliament, E.

6 Bing. N. C. 561; Wilson v. Knubley, 7 East, 128; McWilliam v. Adams, 1 Macq. H. L. Cas. 120; Montrose Peerage, id. 401.

⁶ Miller v. Salomons, 7 Ex. 475; Bradley v. Clark, 5 T. R. 201; Bradford v. Treasurer, Peck, 425; Jones v. Kearns, Mart. & Y. 241; Waller v. Harris, 20 Wend. 555, 561, 32 Am. Dec. 590.

obsolete, or displaced by others radically different. These ancient statutes are a part of our common law.⁷

§ 326 (197). **Federal, state, territorial and colonial statutes.**—The valid acts of congress are those which it enacts in the exercise of the delegated powers enumerated in the federal constitution.⁸ They have force and are binding throughout the Union and the federal domain, or in such lesser part of it as the act professes to operate in. On such subjects the federal laws are supreme — they are domestic; all courts take notice of them.⁹ Treaties are also a part of the law.¹⁰ The federal courts are organized for the enforcement of those laws; they reach in their operation the entire nation, and they are binding on the states and all their departments. The states have supreme power within their limits for local government, except as this power is restrained by the concession of the federal powers in the constitution of the United States. With this limitation, for the purpose of local government, the states are supreme and independent.¹¹ The law-making powers of state legislatures are plenary, subject only to the restrictions of the federal and state constitutions. Colonial statutes are those in force in the colonies prior to their becoming states. Those laws which were suited to their new condition, politically and otherwise, continued to form part of the jurispru-

⁷ *Ante*, § 16.

⁸ *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *United States v. Fisher*, 2 Cranch, 358, 2 L. Ed. 304; *Calder v. Bull*, 3 Dall. 386; *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. Ed. 709, 928; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Padelford v. Mayor*, 14 Ga. 438.

⁹ *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Cook v. Moffat*, 5 How. 295, 12 L. Ed. 159; *United States v. Rathbone*, 2 Paine, 578, Fed. Cas. No. 16,121; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401.

¹⁰ Const., art. 6, 2; *United States v. Schooner Peggy*, 1 Cranch, 103, 2 L. Ed. 49; *Foster v. Neilson*, 2 Pet. 253, 7 L. Ed. 415.

¹¹ *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. Ed. 127; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060; *New York v. Miln*, 11 Pet. 102, 9 L. Ed. 648; *Strader v. Graham*, 10 How. 82, 13 L. Ed. 337; *Sears v. Cottrell*, 5 Mich. 251; *Turner v. Board of Com'rs*, 27 Kan. 639.

dence of the succeeding states until altered by later statutes.¹² Territorial statutes are those enacted by territorial legislatures, pursuant to the authority of an act of congress.¹³

§ 327 (198). **Public and private statutes.**—Blackstone defines a public act as a universal rule that regards the whole community, of which the courts are bound to take judicial notice; private acts are those which concern only a particular species, thing or person, and of these the courts are not bound to take notice; they must be pleaded.¹⁴ Dwaris thus defines these statutes in contradistinction: "Public acts relate to the public at large, and private acts concern the particular interest or benefit of certain individuals or particular classes of men." A public act need not be a universal rule, in the sense that it must purport to apply to the whole territory or the entire people subject to the legislative jurisdiction. It may be applicable to only the smallest political division, or to a small class of the people, and still be a public statute. If it concern the public, and not merely a private interest, it is a public statute, though local or special.¹⁵ A public statute affects the public at large, either throughout the entire state or within the limits of a particular locality where the act operates; and a private statute relates to or affects a particular person, by name, or so that certain individuals or classes of persons are interested in a manner peculiar to themselves, and not in common with the entire community.¹⁶ The distinction by the English common law is not very plainly marked. The American cases,

¹² *Ante*, § 20.

¹³ *National Bank v. Yankton County*, 101 U. S. 129, 25 L. Ed. 1046; *ante*, § 24; 2 Story on Const., § 1325.

¹⁴ 1 Black. Com. 86; *Prigge v. Adams, Skin.* 350.

¹⁵ *Ante*, § 203; *Clark v. Janesville*, 10 Wis. 136; *State v. Baltimore*, 29 Md. 516; *Wheeler v. Philadelphia*,

77 Pa. St. 338; *Brooks v. Hyde*, 37 Cal. 366; *Cox v. State*, 8 Tex. App. 254, 287, 34 Am. Rep. 746; *Powers v. Commonwealth*, 90 Ky. 167, 13 S. W. 450.

¹⁶ *State v. Chambers*, 93 N. C. 600; *People v. Wright*, 70 Ill. 388; *Montague v. State*, 54 Md. 481; *State v. Helmes*, 3 N. J. L. *1050.

however, show a manifest divergence, by enlarging the class of public statutes.¹⁷ In a public act there may be a private clause.¹⁸ So, in a private act, there may be a provision of a public nature;¹⁹ and thus a statute may be public in one part and private in another. A public statute is local when it relates to a particular place or locality, or does not extend to all places which would classify with that to which the act is confined.²⁰ It is special not only when it is local, but also when it is confined in its subject to less than a class of persons or things.²¹ These distinctions have been treated more at large in another place, to which the reader is referred.²²

§ 328 (199). Public and private statutes are construed upon different considerations. In a late case Lord Esher, M. R., said: "In the case of a public act, you construe it keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construction. In the case of a private act which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favor, because the persons who obtain a private act

¹⁷ *Ante*, § 203; *Unity v. Burrage*, 103 U. S. 447, 26 L. Ed. 405; *Stephens Co. v. R. R. Co.*, 33 N. J. L. 229; *State v. Bergen*, 34 N. J. L. 438; *Winooski v. Gokey*, 49 Vt. 282.

¹⁸ *Potter's Dwaris*, 53.

¹⁹ *Rex v. Bugg*, *Skin*. 428; *Allentown v. Hower*, 93 Pa. St. 332, 336; *People v. Supervisors of Chautauqua Co.*, 43 N. Y. 10; *Bretz v. New York*, 4 Abb. Pr. (N. S.) 258; *McLain v. New York*, 3 Daly, 32; *Heridia v. Ayers*, 12 Pick. 334.

²⁰ *People v. Harper*, 91 Ill. 357; *State v. Judges*, 21 Ohio St. 1; *People v. Hills*, 35 N. Y. 449, 451; *Gaskin v. Meek*, 43 id. 186; *People v. O'Brien*, 38 id. 193, 195; *Kerrigan v. Force*, 68 id. 381; *Fire Department*

of Troy v. Bacon, 2 Abb. App. 127; *People v. Allen*, 1 Lans. 248; *Healey v. Dudley*, 5 Lans. 115; *Burnham v. Acton*, 4 Abb. Pr. (N. S.) 1; *Levy v. State*, 6 Ind. 281; *Pierce v. Kimball*, 9 Greenlf. 54; *Bevens v. Baxter*, 23 Ark. 387; *West v. Blake*, 4 Blackf. 234; *Re Wakker*, 1 Edm. Sel. Cas. 575; *McLain v. New York*, 3 Daly, 32. See *Yellow R. Imp. Co. v. Arnold*, 46 Wis. 214, 222; *Orr v. Rhine*, 45 Tex. 343; *People v. Davis*, 61 Barb. 456; *Bretz v. New York*, 6 Robt. 325; *Meshke v. Van Doren*, 16 Wis. 319; *Price v. White*, 27 Mo. 275.

²¹ *Ante*, § 321. See *Wheeler v. Philadelphia*, 77 Pa. St. 338.

²² *Ante*, § 321.

ought to take care that it is so worded that that which they desire to obtain is plainly stated in it; but when the construction is perfectly clear, there is no difference between the modes of construing a private act and a public act.”²³ However difficult the construction of a private act may be, when once the court has arrived at the true construction, after having subjected it to the strictest criticism, the consequences are precisely the same as in the case of a public act.²⁴

§ 329 (200). **Declaratory statutes.**—A declaratory act was originally one declaratory of the common law; such statutes were made, said Mr. Dwarris, when an old custom of the kingdom is almost fallen into disuse, or become disputable, in which case the parliament thinks proper, in *perpetuam rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been.²⁵ Such statutes are to be construed, if possible, according to the common law.²⁶ They are expressed affirmatively or in negative terms. A statute made in the affirmative, without any negative expressed or implied, does not take away the common law. It follows that it does not affect any prescriptions or customs clashing with it which were before allowed; in other words, the common law continues to be construed as it was before the recognition by parliament.²⁷ A statute declaratory of the common law should not retroact upon past controversies, or reverse decisions which the courts in the exercise of their undoubted authority have made. This would be the exercise of judicial power, which, if tolerated, might constitute the legislature a court

²³ *Altrincham Union v. Cheshire Lines Committee*, L. R. 15 Q. B. Div. 597, 603.

²⁴ *Id.*; *Perry v. Newsom*, 1 Ired. Eq. 28; *Bartlett v. Morris*, 9 Port. 266; *Union Pac. R. R. Co. v. United States*, 10 Ct. of Cl. 559 (affirmed, 91 U. S. 72, 23 L. Ed. 224).

²⁵ *Dwar. on St.* 475, 477. See *Moog v. Randolph*, 77 Ala. 597.

²⁶ *People v. Butler*, 16 John. 203; *Hewey v. Nourse*, 54 Me. 256; *Freeman v. People*, 4 Denio, 9, 20, 47 Am. Dec. 216; *Baker v. Baker*, 13 Cal. 87; *Commonwealth v. Humphries*, 7 Mass. 242.

²⁷ *Dwar. on St.*; 2 Inst. 200.

of review in all cases where disappointed partisans could obtain a hearing after being dissatisfied with the rulings of the court.²⁸

§ 330 (201). A declaratory statute is sometimes intended to declare the meaning of an existing statute. Such statutes are akin to interpretation clauses,—they are futile and inoperative in legislation when designed to affect rights retrospectively; but will operate prospectively.²⁹ A declaration in an act of the legislature as to what they intended in a preceding act does not make the law retrospectively what is so declared to be intended, if the previous act will not bear that interpretation; though such declared intention will be effective in the future.³⁰ Such statutes will be construed, if possible, as intended only to lay down the rule for future cases.³¹

§ 331 (202). **Affirmative and negative statutes.**—An *affirmative* statute is one which is enacted in affirmative terms. A negative statute is one expressed in negative terms. These statutes have very different effects; the former is generally cumulative, the other displaces existing rules.

²⁸ Cooley, Const. Lim. 94; *Salters v. Tobias*, 3 Paige, 338; *People v. Supervisors*, 16 N. Y. 424. A mandate of the legislature to the judiciary, directing what construction shall be placed on existing statutes, is an assumption of judicial power, and unconstitutional. *Governor v. Porter*, 5 Humph. 165.

²⁹ *Postmaster-General v. Early*, 12 Wheat. 148, 6 L. Ed. 577; *Governor v. Porter*, 5 Humph. 165; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *Reiser v. Tell Ass'n*, 39 Pa. St. 137; *Kupfert v. Building Ass'n*, 30 Pa. St. 465; *Lincoln, etc. Ass'n v. Graham*, 7 Neb. 173; *Moser v. White*, 29 Mich. 59; *People v. Supervisors*, 16 N. Y. 424; *Ogden v. Blackledge*, 2 Cranch, 272, 2 L. Ed.

276; *Dash v. Van Kleeck*, 7 John. 477, 5 Am. Dec. 291; *Young v. Beardsley*, 11 Paige, 93; *Ashley, Appellant*, 4 Pick. 23. See *Reis v. Graff*, 51 Cal. 86.

³⁰ *Bassett v. United States*, 2 Ct. of Cl. 448.

³¹ *Todd v. Clapp*, 118 Mass. 495; *Shallow v. Salem*, 136 id. 136; *McNichol v. United States, etc. Agency*, 74 Mo. 457; *Bernier v. Becker*, 37 Ohio St. 72; *Linn v. Scott*, 3 Tex. 67; *Citizens' Gas Light Co. v. Alden*, 44 N. J. L. 648; *Lambertson v. Hogan*, 2 Pa. St. 22; *Journeay v. Gibson*, 56 id. 57, 61; *James v. Rowland*, 52 Md. 463; *Le Bois v. Bramell*, 4 How. 449, 11 L. Ed. 1051; *Bassett v. United States*, 2 Ct. of Cl. 448.

An affirmative statute does not take away the common law in relation to the same matter.³² An affirmative provision without any negative expressed or implied makes no alteration in any common-law rule in regard to the same subject-matter. A statute authorizing a tenant in fee to lease for twenty-one years did not affect his common-law right to lease for a longer period.³³ An act authorizing a particular court to try a certain offense does not conflict with an earlier act giving power to another to try the same offense.³⁴ So a statute imposing a liability on certain persons to repair a road was held not inconsistent with the common-law duty of the parish to make such repairs, and therefore did not impliedly exonerate the parish.³⁵ Where an affirmative statute provides a new remedy for an existing right not inconsistent with the common-law remedy, the latter is not abolished; the new remedy is cumulative, and the party possessing the right may pursue either at his election.³⁶ The same rule applies as between successive statutory remedies

³² Co. Litt. 115*a*; Jackson v. Bratt, 3 Caines, 169; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Attorney-General v. Brown, 1 Wis. 513; Mullen v. People, 31 Ill. 444; Nixon v. Piffet, 16 La. Ann. 379; State v. Macon Co. Ct., 41 Mo. 453; Planters' Bank v. State, 6 Sm. & M. 628; White v. Johnson, 23 Miss. 68; De Pauw v. New Albany, 22 Ind. 204; Blain v. Bailey, 25 id. 165; McLaughlin v. Hoover, 1 Ore. 31; Brown v. Miller, 4 J. J. Marsh. 474; Lillard v. McGee, 4 Bibb, 165; South's Heirs v. Hoy, 3 Bibb, 522.

³³ Dwar. on St. 475.

³⁴ Co. Litt. 115*a*.

³⁵ Rex v. St. George's Hanover Square, 3 Camp. 222. See Gibson v. Preston, L. R. 5 Q. B. 219.

³⁶ Caswell v. Worth, 5 E. & B. 849; Waldo v. Bell, 13 La. Ann. 329; Raudebaugh v. Shelley, 6 Ohio St.

307; O'Flaherty v. McDowell, 6 H. L. Cas. 143; Livingston v. Van Ingen, 9 John. 507; Crittenden v. Wilson, 5 Cowen, 165; Stafford v. Ingersol, 3 Hill, 38; Heath, Ex parte, id. 42; Kelly v. Union Township, 5 Watts & S. 536; Renwick v. Morris, 3 Hill, 621; Barden v. Crocker, 10 Pick. 383; Mitchell v. Duncan, 7 Fla. 13; State v. Berry, 12 Iowa, 58; Wilson v. Shorick, 21 id. 332; Cox v. Robins, 4 Halst. 384; Mayor, etc. v. Howard, 6 Har. & J. 383; Bearcamp River Co. v. Woodman, 2 Greenl. 404; Booker v. McRoberts, 1 Call, 243; Almy v. Harris, 5 John. 175; Farmers' Turnpike v. Coventry, 10 id. 389; Fryeburg Canal v. Frye, 5 Greenl. 38; Wetmore v. Tracy, 14 Wend. 250; United States v. Wynn, 5 Hill, 16; Constantine v. Van Winkle, 6 id. 177; Leland v. Tousey, id. 328.

or successive statutes creating rights, and against implied repeal.³⁷ An affirmative statute giving a new right does not of itself and necessarily destroy a previously existing right, created by another statute to which it does not refer, but will do so if it appears to have been the intention of the legislature that the two rights should not exist together.³⁸ Although a statute provides that a certain thing shall prove a certain fact, this does not render other proof incompetent unless it is explicitly so provided.³⁹ The absence from the code of a principle which has been part of the jurisprudence does not impair its authority.⁴⁰

§ 332 (203). A *negative* statute is one expressed in negative terms. And here the rule prevails that if a subsequent statute, contrary to a former, has negative words, it shall be a repeal of the former; and a negative statute, it is said too, so binds the common law that a man cannot afterwards have recourse to the latter.⁴¹ Of this form and nature is this provision generally found in the statute of limitations: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this statute, unless the same is contained in some writing signed by the party to be charged thereby." Negative words make a statute imperative.⁴²

§ 333 (204). An *affirmative* statute may imply a negative. If a new power be given by an affirmative statute to a certain person by a particular designation, although it be an affirmative statute, still all other persons are in general

³⁷ *Gohen v. Railroad Co.*, 2 Woods, 346, Fed. Cas. No. 5506; *Cont. Election of Barber*, In re, 86 Pa. St. 392.

³⁸ *O'Flaherty v. McDowell*, 6 H. L. Cas. 142; *Stewart v. Greaves*, 10 M. & W. 712.

³⁹ *Bethlehem v. Watertown*, 51 Conn. 490.

⁴⁰ *Martin v. Jennings*, 10 La. Ann. 553.

⁴¹ 2 Inst. 388.

⁴² *Bladen v. Philadelphia*, 60 Pa. St. 464; *State v. Smith*, 67 Me. 328; *Hurford v. Omaha*, 4 Neb. 336; *People v. Allen*, 6 Wend. 486; *Liverpool Borough Bank v. Turner*, 2 De G. F. & J. 502; *Rex v. Newcomb*, 4 T. R. 368; *Howard v. Bodington*, L. R. 2 P. Div. 203, 211; *Williams v. Swansea Canal Nav. Co.*, L. R. 3 Ex. 158.

excluded from the exercise of the power, since *expressio unius est exclusio alterius*. Thus, if an action founded upon a statute be directed to be brought before the justices of Glamorgan in sessions, it cannot be brought before any other person or in any other place.⁴³ If a thing is limited to be done in a particular form or manner it excludes every other mode, and affirmative expressions introducing a new rule imply a negative.⁴⁴ Affirmative words which are imperative, and therefore mandatory, imply a negative of anything contrary or alternative to the direction so given.⁴⁵ Where an act requires that a juror shall have twenty pounds a year, and a later act that he shall have twenty marks, the latter implies an abrogation of the former, otherwise it would have no effect.⁴⁶ There is an implied negative in statutes which are intended to prescribe the only rule to be observed; they repeal all acts which provide a different rule.⁴⁷ Where a statute creates a right, and also provides the remedy, the latter is exclusive; it implies a negation of any other.⁴⁸ So where the same statute creates an offense,

⁴³ Sedgw. Const. St. & Const. L. 30.

⁴⁴ District Township, etc. v. Dubuque, 7 Iowa, 262; Smith v. Stevens, 10 Wall. 321, 19 L. Ed. 933; Uncas National Bank v. Rith, 23 Wis. 339; New Haven v. Whitney, 36 Conn. 373; Wallace v. Holmes, 9 Blatchf. 65, Fed. Cas. No. 17,100; Burgoyne v. Supervisors, 5 Cal. 22; Watkins v. Wassell, 20 Ark. 410; Perkins v. Thornburgh, 10 Cal. 189.

⁴⁵ Davison v. Gill, 1 East, 64; Bryan v. Sundberg, 5 Tex. 418.

⁴⁶ Rex v. Worcestershire, 5 M. & S. 457; Curtis v. Gill, 34 Conn. 49; Gorham v. Lockett, 6 B. Mon. 146; 1 Black. Com. 89.

⁴⁷ People v. Burt, 43 Cal. 561; Daviess v. Fairbairn, 3 How. 636, 11 L. Ed. 760; Industrial School Dist.

v. Whitehead, 13 N. J. Eq. 290; Roche v. Mayor, etc., 40 N. J. L. 257; Swann v. Buck, 40 Miss. 268; Riggs v. Brewer, 64 Ala. 282; Daw v. Metropolitan Board, 12 C. B. (N. S.) 161; Re Spring Street, 112 Pa. St. 258; Re Alley in Kutztown, 2 Woodw. Dec. (Pa.) 373; Sacramento v. Bird, 15 Cal. 294; State v. Conkling, 19 id. 501.

⁴⁸ Lang v. Scott, 1 Blackf. 405; Smith v. Lockwood, 13 Barb. 209; Almy v. Harris, 5 John. 175; Dudley v. Mayhew, 3 Comst. 9; Thurston v. Prentiss, 1 Mich. 193; State v. Corwin, 4 Mo. 609; Bailey v. Bryan, 3 Jones (N. C.), 357; Ham v. Steamboat Hamburg, 2 Iowa, 460; Conwell v. Hagerstown Canal, 2 Ind. 588; Victory v. Fitzpatrick, 8 Ind. 281; McCormack v. Terre

prescribes the penalty and mode of procedure, only what the statute thus ordains is permissible.⁴⁹

§ 334 (205). **Preceptive, prohibitive and permissive statutes.**—When a statute commands certain actions, and regulates the forms and acts which ought to accompany them, it is called a *preceptive* statute.⁵⁰ A *prohibitive* statute is one that forbids all actions which disturb the public repose, and injury to the rights of others, or crimes and misdemeanors, or when it forbids certain acts in relation to the transmission of estates or the capacity of persons or other objects.⁵¹ A *permissive* statute is one which allows certain actions or things to be done without commanding them; as, for example, when it allows persons of a certain description, or, indeed, any person, to make a will,⁵² to pre-empt lands, to vote, or to form corporations. Of this nature is a statute which permits a candidate at an election at the polling place or canvass, or that a clergyman accused of an ecclesiastical offense may attend the proceedings of the commission appointed to inquire into the accusation.⁵³ Such statutes

Haute, etc. R. R., 9 id. 283; Camden v. Allen, 2 Dutch. 398; West v. Downman, L. R. 14 Ch. Div. 111; Colley v. London, etc. Co., L. R. 5 Ex. Div. 277; Brain v. Thomas, 50 L. J. Q. B. Div. 663; Bonham v. Bd. of Education, 4 Dill. 156, Fed. Cas. No. 1629. There are three classes of cases in which statutes deal with liabilities: 1. Where a liability existed at common law, and was only re-enacted by the statute with a special form of remedy; in such cases the plaintiff has his election unless the statute contains words necessarily excluding the common-law remedy. 2. Where a statute has created a liability but given no remedy, there a party may adopt an action of debt or other remedy at common law to enforce it. Wood v. Bank, 9 Cow. 194; Cole v.

Thayer, 8 Cow. 249; Gallatian v. Cunningham, 8 Cow. 364; Judson v. Leach, 7 Cow. 152. 3. When the statute creates a liability not existing at common law and gives a particular remedy; here the party must adopt the form of remedy given by the statute. Vallance v. Falle, L. R. 13 Q. B. Div. 109; Bailey v. Bailey, L. R. 13 Q. B. Div. 859; O'Flaherty v. McDowell, 6 H. L. Cas. 143; Steward v. Greaves, 10 M. & W. 711.

⁴⁹ Bashaw v. State, 1 Yerg. 177, 185; Stradling v. Morgan, 1 Plowd. 206; Slade v. Drake, Hobart, 295; Bish. W. L., § 250.

⁵⁰ 1 Bouv. Inst. 48.

⁵¹ 1 Bouv. Inst. 48.

⁵² Potter's Dwar. 74.

⁵³ Endl. on St. Int., § 310.

confer a privilege or license which the donee may exercise or not at pleasure, having only his own convenience or interest to consult.⁵⁴

§ 335 (206). **Prospective and retrospective statutes.**—A *prospective* statute is one which regulates the future.⁵⁵ It operates upon acts done and transactions occurring after it takes effect.

A *retrospective* statute, on the other hand, operates upon a subject already existing or an act done. Certain statutes of this nature are unjust, and, says Chancellor Kent, "are very generally considered as founded on unconstitutional principles, and consequently inoperative and void."⁵⁶ Of this obnoxious character are those affecting and changing vested rights;⁵⁷ one which takes away or impairs any vested right under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.⁵⁸ This re-

⁵⁴Id. See *Nicholl v. Allen*, 1 B. & S. 934; *Brockbank v. Whitehaven R. Co.*, 7 H. & N. 834; *Rockwell v. Clark*, 44 Conn. 534.

⁵⁵Bouv. Inst. 49.

⁵⁶1 Kent's Com. 455.

⁵⁷Id.; *Ogden v. Blackledge*, 2 Cr. 272, 2 L. Ed. 276; *Brunswick v. Litchfield*, 2 Greenl. 28; *Osborne v. Huger*, 1 Bay, 179; *Bedford v. Shilling*, 4 S. & R. 401, 8 Am. Dec. 718; *Eakin v. Raub*, 12 S. & R. 363; *Society for Propagating the Gospel v. New Haven*, 8 Wheat. 464, 493, 5 L. Ed. 662; *Wilkinson v. Leland*, 2 Pet. 657, 7 L. Ed. 542.

⁵⁸*Society v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13,156; *Merrill v. Sherburne*, 1 N. H. 199; *Lewis v. Brackenridge*, 1 Blackf. 220; *Boyce v. Holmes*, 2 Ala. 54; *Jones v. Wootten*, 1 Harr. (Del.) 77; *Williamson*

v. Field, 2 Sandf. Ch. 533; *Forsyth v. Marbury*, R. M. Charlt. 333; *Dash v. Van Kleeck*, 7 John. 477, 5 Am. Dec. 291; *People v. Platt*, 17 John. 195; *Houston v. Boyle*, 10 Ired. 496; *Cook v. Mutual Ins. Co.*, 53 Ala. 37; *Dubois v. McLean*, 4 McLean, 486, Fed. Cas. No. 4107; *State v. Doherty*, 60 Me. 504; *Union Iron Co. v. Pierce*, 4 Biss. 327, Fed. Cas. No. 14,367; *Hoagland v. Sacramento*, 52 Cal. 142; *Gunn v. Barry*, 15 Wall. 610, 21 L. Ed. 212; *Ahl v. Rhoads*, 84 Pa. St. 319; *Hart v. State*, 40 Ala. 32; *Lambertson v. Hogan*, 2 Pa. St. 22; *Douglass v. Pike*, 101 U. S. 677, 25 L. Ed. 968; *Strong v. Dennis*, 13 Ind. 514; *Logan v. Walton*, 12 id. 639; *Strong v. Clem*, id. 37, 74 Am. Dec. 200; *Dequindre v. Williams*, 31 Ind. 444; *Finn v. Haynes*, 37 Mich. 63; *Jordan v. Wimer*, 45 Iowa, 65.

striction, as already shown, is applicable to interpretation and declaratory laws.⁵⁹

Ex post facto laws, and those impairing the obligation of contracts, are expressly forbidden by the federal and by state constitutions. The constitutions of some states expressly prohibit retrospective laws generally.⁶⁰ To avoid injustice and unconstitutionality, it is always laid down as a rule of construction that a statute is to be taken or construed as prospective, unless its language is inconsistent with that interpretation.⁶¹

⁵⁹ *Ante*, § 329; 2 Kent's Com. 23, 24; McManning v. Farrar, 46 Mo. 376.

⁶⁰ Rich v. Flanders, 39 N. H. 304; De Cordova v. Galveston, 4 Tex. 470; Goshorn v. Purcell, 11 Ohio St. 641.

⁶¹ 1 Kent's Com. 455, note; Bart-ruff v. Remey, 15 Iowa, 257; McEwen v. Den, 24 How. 242, 16 L. Ed. 672; Quackenbush v. Danks, 1 Denio, 128; S. C., 3 Denio, 594; Van Fleet v. Van Fleet, 49 Mich. 610, 14 N. W. 566; Banks v. Quackenbush, 1 N. Y. 129; Atkinson v. Dunlap, 50 Me. 111; North Bridge-water Bank v. Copeland, 7 Allen, 139; Harvey v. Tyler, 2 Wall. 328, 347, 17 L. Ed. 871; Richardson v. Cook, 37 Vt. 599, 88 Am. Dec. 622; Plumb v. Sawyer, 21 Conn. 351; Taylor v. Keeler, 30 Conn. 324; Torrey v. Corliss, 33 Me. 333; Hopkins v. Jones, 22 Ind. 310; Seamans v. Carter, 15 Wis. 548, 82 Am. Rep. 696; Boston, etc. R. R. Co. v. Cilley, 44 N. H. 578; Hannum v. Bank of Tennessee, 1 Cold. 398; Saunders v. Carroll, 12 La. Ann. 793; State v. Bradford, 36 Ga. 422; Whitman v. Haggood, 10 Mass. 437; Somerset v. Dighton, 12 id. 383; Gardner v. Lucas, L. R. 3 App. Cas. 582, 600-603;

Moon v. Durden, 2 Ex. 22; Regina v. Ipswich Union, 2 Q. B. Div. 269; Suche, In re, 1 Ch. Div. 48, 50; Martin v. State, 22 Tex. 214; Reis v. Graff, 51 Cal. 86; People v. O'Neil, id. 91; People v. Kinsman, id. 92; People v. McCain, id. 360; Matter of Prot. Epis. School, 58 Barb. 161; Brown v. Wilcox, 14 Sm. & M. 127; Bond v. Munro, 28 Ga. 597; Hopkins v. Jones, 22 Ind. 310; Aurora, etc. Turnpike v. Holthouse, 7 id. 59; Frank v. San Francisco, 21 Cal. 668; Thorne v. Same, 4 id. 127; State v. Atwood, 11 Wis. 422; Edmonds v. Lawley, 6 M. & W. 285; Abington v. Duxbury, 105 Mass. 287; Reynolds v. State, 1 Ga. 222; Briggs v. Hubbard, 19 Vt. 86; Amsbry v. Hinds, 48 N. Y. 57; Head v. Ward, 1 J. J. Marsh. 280; Regina v. Mallow Union, 12 Ir. C. L. (N. S.) 35; People v. Peacock, 98 Ill. 172; Medford v. Learned, 16 Mass. 215; Young v. Hughes, 4 H. & N. 76; Williams v. Smith, 4 H. & N. 559; Jarvis v. Jarvis, 3 Edw. Ch. 462; Finney v. Ackerman, 21 Wis. 268; Dewart v. Purdy, 29 Pa. St. 113; Taylor v. Mitchell, 57 Pa. St. 209; State v. Auditor, 41 Mo. 25; Van Rensselaer v. Livingston, 12 Wend.

All retrospective statutes, however, are not unjust or unconstitutional. A large class of remedial and curative statutes have been enacted with beneficent effect. They are liberally construed to carry out the intention of the legislature, in view of the intrinsic merit of the particular case and on a broad, fostering consideration of the general interest.⁶² Statutes relating to remedies and forms of procedure generally apply to rights already accrued, to cases ripe for action, and actions pending;⁶³ but subject to the principle that the right is not thereby destroyed or seriously impaired.⁶⁴ The legislature is not restrained from all legislation which may

490; *Ely v. Holton*, 15 N. Y. 595; *Western Union Railroad v. Fulton*, 64 Ill. 271; *Gerry v. Stoneham*, 1 Allen, 319; *State v. Scudder*, 32 N. J. L. 203; *Bay v. Gage*, 36 Barb. 447; *United States v. Starr*, Hempst. 469, Fed. Cas. No. 16,379; *Hepburn v. Griswold*, 8 Wall. 603. 19 L. Ed. 513; *Williams v. Johnson*, Adm'x, 30 Md. 500, 96 Am. Dec. 613; *Parsons v. Paine*, 26 Ark. 124.

⁶² *Sturgis v. Hull*, 48 Vt. 302; *State v. Smith*, 38 Conn. 397; *Ballard v. Ward*, 89 Pa. St. 358; *Austin v. Stevens*, 24 Mo. 520; *Baldwin v. Newark*, 38 N. J. L. 158; *Cook v. Sexton*, 79 N. C. 305; *State v. Wilmington, etc. R. R. Co.*, 74 id. 143; *State v. Wolfarth*, 42 Conn. 155; *Bronson v. Newberry*, 2 Doug. (Mich.) 38; *Reed v. Rawson*, 2 Litt. 189; *Miller v. Moore*, 1 E. D. Smith, 739; *Wilder v. Lumpkin*, 4 Ga. 208; *Perry v. Commonwealth*, 3 Gratt. 632; *Smith v. Kibbee*, 9 Ohio St. 563; *Bensley v. Ellis*, 39 Cal. 309; *Miller v. Miller*, 16 Mass. 59; *Annable v. Patch*, 3 Pick. 360; *Johnson v. Johnson*, 26 Ind. 441; *Regina v. Vine*, L. R. 10 Q. B. 195; *Miller v. Graham*, 17 Ohio St. 1; *Riggins*

v. State, 4 Kan. 173; *Tilton v. Swift*, 40 Iowa, 78.

⁶³ *Sampeyreac v. United States*, 7 Pet. 222, 8 L. Ed. 665; *Blair v. Cary*, 9 Wis. 543; *Henschall v. Schmidt*, 50 Mo. 454; *Rivers v. Cole*, 38 Iowa, 677; *Hoa v. Lefranc*, 18 La. Ann. 393; *Mercer v. State*, 17 Ga. 146; *Donner v. Palmer*, 23 Cal. 40; *Walston v. Commonwealth*, 16 B. Mon. 15; *Burch v. Newbury*, 10 N. Y. 374; *Morse v. Gould*, 11 id. 281, 62 Am. Dec. 103; *Van Rensselaer v. Snyder*, 13 N. Y. 299; *Jacquins v. Commonwealth*, 9 Cush. 279; *McNamara v. Minn. Cent. Ry. Co.*, 12 Minn. 388; *Brock v. Parker*, 5 Ind. 538; *Indianapolis v. Imberry*, 17 id. 175; *Commonwealth v. Bradley*, 16 Gray, 241; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Horner v. Lyman*, 2 Abb. App. Dec. 399.

⁶⁴ *Kimbray v. Draper*, L. R. 3 Q. B. 160; *Wright v. Hale*, 6 H. & N. 227; *Mann v. McAtee*, 87 Cal. 11; *State v. Smith*, 38 Conn. 397; *Doolbass v. Ramloll*, 7 Moore, P. C. 239; *Bradford v. Barclay*, 42 Ala. 375; *Reid v. State*, 20 Ga. 681; *Templeton v. Horne*, 82 Ill. 491; *United States v. Gilmore*, 8 Wall. 330, 19

prejudicially affect private interests not protected by the constitution.⁶⁵ In a later chapter this subject will be treated more at length.⁶⁶

§ 336 (207). **Remedial statutes.**—Remedial statutes are such as the name implies, embracing a great variety in detail; those enacted to afford a remedy, or to improve and facilitate remedies existing for the enforcement of rights and the redress of injuries; and also those intended for the correction of defects, mistakes and omissions in the civil institutions and administrative policy of the state. It is a rule that remedial statutes are to be liberally construed to

L. Ed. 396; *Mabry v. Baxter*, 11 Heisk. 682; *Rutherford v. Greene*, 2 Wheat. 196, 4 L. Ed. 218; *Green v. Biddle*, 8 Wheat. 92, 5 L. Ed. 547; *Cambridge v. Boston*, 130 Mass. 357; *Berley v. Rampacher*, 5 Duer, 183; *Kelsey v. Kendall*, 48 Vt. 24; *Dequindre v. Williams*, 31 Ind. 444; *State v. Berry*, 25 Mo. 355; *Union Iron Co. v. Pierce*, 4 Biss. 327, Fed. Cas. No. 14,367; *Governor v. Porter*, 5 Humph. 165; *People v. Supervisors*, 16 N. Y. 424; *Simco v. State*, 8 Tex. App. 406; *Haley v. Philadelphia*, 68 Pa. St. 45; *Edwards v. Williamson*, 70 Ala. 145; *Merwin v. Ballard*, 66 N. C. 398; *Nelson v. McCrary*, 60 Ala. 310; *Lee v. Cook*, 1 Wyom. Ter. 413; *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143; *McCracken v. Hayward*, 2 How. 608, 11 L. Ed. 397; *Ewing's Case*, 5 Gratt. 701; *Von Hoffman v. Quincy*, 4 Wall. 552, 18 L. Ed. 403; *White v. Hart*, 13 Wall. 646, 20 L. Ed. 685; *Walker v. Whitehead*, 16 Wall. 314, 21 L. Ed. 357; *Pollard, Ex parte*, 40 Ala. 77. See *Chaney v. State*, 31 Ala. 342; *Steamboat Farmer v. McCraw*, id. 659, 62 Am. Dec. 718; *Uwchlan Township Road*, 30 Pa. St. 156.

⁶⁵See *Charles River Bridge v. Warren Bridge*, 11 Pet. 539, 9 L. Ed. 773, 938; *Commonwealth v. Logan*, 12 Gray, 136; *Harris v. Glenn*, 56 Ga. 94; *Regina v. Vine*, L. R. 10 Q. B. 195; *State v. Scudder*, 32 N. J. L. 203; *Wilder v. Me. Cent. R.* 65 Me. 332; *Bank of Toledo v. Bond*, 1 Ohio St. 622; *Gorman v. Pacific R. R.*, 26 Mo. 441, 72 Am. Dec. 220; *Barton v. Morris*, 15 Ohio, 408; *Hagerstown v. Sehner*, 37 Md. 180; *Sedgwick v. Bunker*, 16 Kan. 498; *Milton v. Swift*, 40 Iowa, 78; *Hess v. Johnson*, 3 W. Va. 645; *Stokes v. Rodman*, 5 R. I. 405; *Stine v. Bennett*, 13 Minn. 153; *Kunkle v. Franklin*, id. 127; *Comer v. Folsom*, id. 219; *Wilson v. Buckman*, id. 441; *State v. Newark*, 3 Dutch. 185; *Calder v. Bull*, 3 Dall. 386; *Sparks v. Clapper*, 30 Ind. 204; *Coffin v. State*, 7 id. 157; *Noel v. Ewing*, 9 id. 37; *People v. Frisbie*, 26 Cal. 135; *Rottenberry v. Pipes*, 53 Ala. 447; *Ware v. Owens*, 42 id. 212; *Bachman v. Chrisman*, 23 Pa. St. 162; *Norfolk v. Chamberlaine*, 29 Gratt. 534; *Languille v. State*, 4 Tex. App. 312.

⁶⁶ *Post*, ch. XVII.

suppress the evil and advance the remedy.⁶⁷ But other rules also apply, even to particular provisions of such statutes which come within the general notion of remedial laws, and qualify and abridge the application of the rule of liberal construction, as will be seen hereafter. As, for example, statutes in derogation of the common law;⁶⁸ or for taking private property for public use;⁶⁹ statutes granting

⁶⁷ *Heydon's Case*, 3 Rep. 7b; *Turle v. Hartwell*, 6 T. R. 429; *Vigo's Case*, 21 Wall. 648, 22 L. Ed. 690; *Davenport v. Barnes*, 2 N. J. L. 211; *Franklin v. Franklin*, 1 Md. Ch. 342; *Twycross v. Grant*, 2 C. P. D. 530; *Cullerton v. Mead*, 22 Cal. 95; *Hudler v. Golden*, 36 N. Y. 446; *Fuller v. Rood*, 3 Hill, 258; *Smith v. Moffat*, 1 Barb. 65; *McCormick v. Alexander*, 2 Ohio, 284; *Lessee of Burgett v. Burgett*, 1 id. 219, 13 Am. Dec. 634; *Wilber v. Paine*, 1 Ohio, 17; *Fox v. New Orleans*, 12 La. Ann. 154, 78 Am. Dec. 766; *Fox v. Sloo*, 10 La. Ann. 11; *Schuykill Nav. Co. v. Loose*, 19 Pa. St. 15; *Quinn v. Fidelity, etc. Ass'n*, 100 id. 382; *Bolton v. King*, 105 id. 78; *Hassengplug's Appeal*, 106 id. 527; *Poor District v. Poor District*, 109 id. 579; *Tuskaloosa Bridge v. Jemison*, 33 Ala. 476; *Marshall v. Vultee*, 1 E. D. Smith, 294; *Mayor, etc. v. Lord*, 17 Wend. 285; *Jones v. Collins*, 16 Wis. 594; *Pearson v. Lovejoy*, 53 Barb. 407; *Jackson v. Warren*, 32 Ill. 331; *Smith v. Stevens*, 82 id. 554; *Chicago, etc. R. R. Co. v. Dunn*, 52 id. 260; *Converse v. Burrows*, 2 Minn. 229; *Wolcott v. Pond*, 19 Conn. 597; *New Orleans v. St. Romes*, 9 La. Ann. 573; *First School Dist. v. Ufford*, 52 Conn. 44; *Mitchell v. Mitchell*, 1 Gill, 66; *Buck v. Eureka*, 97 Cal. 135, 31 Pac. 845; *Union*

Pac. Ry. Co. v. De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350; *Greeley & Salt Lake & Pac. R. R. Co. v. Harris*, 12 Colo. 226, 20 Pac. 764; *Heil v. Simmonds*, 17 Colo. 47, 28 Pac. 475; *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352; *Price v. Society for Savings*, 64 Conn. 362, 30 Atl. 139, 42 Am. St. Rep. 198; *Tyler v. Mut. Dist. Messenger Co.*, 13 App. Cas. (D. C.) 267; *People v. Johnson*, 23 Colo. 150, 46 Pac. 681; *Farwell v. Cohen*, 138 Ill. 216, 28 N. E. 35, 32 N. E. 893; *Baltimore & O. R. R. Co. v. Keck*, 185 Ill. 400, 57 N. E. 197; *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; *State v. Ames*, 87 Minn. 23, 91 N. W. 18; *McIntosh v. Johnson*, 51 Nev. 33, 70 N. W. 522; *White v. Eisman*, 134 N. Y. 101, 31 N. E. 276.

⁶⁸ *Burnside v. Whitney*, 21 N. Y. 148; *Smith v. Randall*, 3 Hill, 495; *People v. Hulse*, id. 309; *Brown v. Fifield*, 4 Mich. 322; *Hollenback v. Fleming*, 6 Hill, 307; *Dwelly v. Dwelly*, 46 Ma. 377; *Harrison v. Leach*, 4 W. Va. 383; *Gibson v. Commonwealth*, 87 Pa. St. 253; *Wilson v. Arnold*, 5 Mich. 98; *Fessenden v. Hill*, 6 id. 212; *Galpin v. Abbott*, id. 17; *Hollman v. Bennett*, 44 Miss. 322; *Thompson v. Clay*, 60 Mich. 62.

⁶⁹ *Powers' Appeal*, 29 Mich. 504;

power,⁷⁰ or authorizing summary proceedings for obtaining judgment, as by motion,⁷¹ writs of attachment,⁷² and those providing for any novel proceeding or remedy.⁷³

§ 337 (208). **Penal statutes.**—Such statutes are often treated as contradistinguished from remedial statutes. They are not, however, in full and direct contrast. Penal statutes are those by which punishments are imposed for transgressions of the law. They are construed strictly and more or less so according to the severity of the penalty.⁷⁴ When a

Sharp v. Speir, 4 Hill, 76; Sharp v. Johnson, 4 id. 92, 40 Am. Dec. 259; Gilmer v. Lime Point, 19 Cal. 47.

⁷⁰ Best v. Gholson, 89 Ill. 465; Banks v. Darden, 18 Ga. 318; Chicago, etc. R. R. Co. v. Smith, 78 Ill. 96; Morris Aqueduct v. Jones, 36 N. J. L. 206; Matthews v. Skinker, 62 Mo. 329; People v. Supervisors, 6 Hun, 304; Ryan v. State, 32 Tex. 280.

⁷¹ Hearn v. Ewin, 3 Cold. 399.

⁷² McQueen v. Middletown, etc. Co., 16 John. 5; Edwards v. Davis, 16 John. 281.

⁷³ See Hubbell v. Denison, 20 Wend. 181; Waller v. Harris, id. 555, 32 Am. Dec. 590; Cole v. Perry, 8 Cow. 214; Townsend v. Chase, 1 id. 115; Sacia v. De Graaf, id. 356; Jackson v. Hobby, 20 John. 361; Hale v. Angel, id. 342; Underwood v. Irving, 3 Cow. 59; Jackson v. Shepherd, 6 id. 444; Smith v. Mumford, 9 id. 29; Bank v. Ibbotson, 5 Hill, 461; Hoffman v. Dunlop, 1 Barb. 185; People v. Recorder, 6 Hill, 429; Smith v. Argall, id. 479; Huntington v. Forkson, id. 149; Sherwood v. Reade, 7 id. 481; Doughty v. Hope, 1 N. Y. 79; Danks v. Quackenbush, id. 129; Dudley v. Mayhew, 3 N. Y. 9; Powell v. Tuttle, id. 396; Humphrey v. Chamber-

lain, 11 id. 274; Clarkson v. Railroad Co., 12 id. 304; Wait v. Van Allen, 22 id. 319; Willard v. Fralick, 31 Mich. 431; Colgate v. Penn. Co., 102 N. Y. 127, 6 N. E. 114.

⁷⁴ Hall v. State, 20 Ohio, 7; Van Rennselaer v. Sheriff, 1 Cow. 443; Seaving v. Brinkerhoff, 5 John. Ch. 329; Van Valkenburgh v. Torrey, 7 Cow. 252; Andrews v. United States, 2 Story, 202, Fed. Cas. No. 381; Carpenter v. People, 8 Barb. 603; State v. Solomons, 3 Hill (S.C.), 96; United States v. Ramsay, Hempst. 481, Fed. Cas. No. 16,115; United States v. Starr, Hempst. 469, Fed. Cas. No. 16,379; United States v. Ragsdale, Hempst. 497, Fed. Cas. No. 16,113; Commonwealth v. Martin, 17 Mass. 359; Commonwealth v. Keniston, 5 Pick. 420; Gibson v. State, 38 Ga. 571; State v. Upchurch, 9 Ired. 454; Reed v. Davis, 8 Pick. 514; Warner v. Commonwealth, 1 Pa. St. 154, 44 Am. Dec. 114; Lair v. Killmer, 1 Dutch. 522; State v. Whetstone, 13 La. Ann. 376; Gunter v. Leckey, 30 Ala. 591; United States v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; Randolph v. State, 9 Tex. 521; Strong v. Stebbins, 5 Cow. 210; Thurber v. Royal Ins. Co., 1 Marvel (Del.), 251, 40 Atl. 1111; Commonwealth v. Equitable

law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the law-giver, it will not be presumed that he intended it should extend further than is expressed; and humanity would require that it should be so limited in the construction.⁷⁵ The general purpose or aim of a statute may be remedial; as where they provide punitive compensation to the injured party.⁷⁶ But the provisions that enforce the wrong for which a penalty is provided, and those which define the punishment, are penal in their character and are construed accordingly.⁷⁷ A statute may be remedial in one part and penal in another.⁷⁸ And the same statute may be remedial for certain purposes, and liberally construed therefor, and at the same time be of such a nature, and operate with such harshness upon a class of offenders subject to it, that they are entitled to invoke the rule of strict construction.⁷⁹ All of the provisions of criminal statutes are not construed strictly; they are construed strictly against the accused, and favorably and equitably for him.⁸⁰

Life Ass. Soc., 100 Ky. 341, 38 S. W. 491; Ferch v. Victoria Elevator Co., 79 Minn. 416, 82 N. W. 678; Hendricks v. State, 79 Miss. 368, 30 So. 708; State v. Peterson, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616; Welthey v. Kemper, 17 Mont. 491, 43 Pac. 716; State v. Wheeler, 23 Nev. 143, 44 Pac. 430; Bolles v. Outing Co., 175 U. S. 262, 20 S. C. Rep. 94, 44 L. Ed. 156.

⁷⁵ State v. Stephenson, 2 Bailey, 334.

⁷⁶ Reed v. Northfield, 13 Pick. 94, 100; Stanley v. Wharton, 9 Price, 301; Palmer v. York Bank, 18 Me. 166, 86 Am. Dec. 710; Bayard v.

Smith, 17 Wend. 88; Frohock v. Pattee, 38 Me. 103; Sloan v. Johnson, 14 S. & M. 47; Foote v. Vanzandt, 34 Miss. 40.

⁷⁷ Bay City, etc. R. R. Co. v. Austin, 21 Mich. 390; Smith v. Causey, 22 Ala. 568; Cohn v. Neeves, 40 Wis. 393; Le Forest v. Tolman, 117 Mass. 109; Swift v. Applebone, 23 Mich. 252.

⁷⁸ Wynne v. Middleton, 1 Wils. 126; Raynard v. Chase, 1 Burr. 2, 6; Smith v. Townsend, 148 U. S. 490, 13 S. C. Rep. 634, 37 L. Ed. 533.

⁷⁹ Hathaway v. Johnson, 55 N. Y. 93.

⁸⁰ 1 Hawk. P. C., Curwood's ed., 90; Myers v. State, 1 Conn. 502; Warrington v. Furber, 8 East, 242,

§ 338 (209). **Repealing statutes.**— These are revocations of former statutory enactments.⁸¹ A repeal may be in express words or by implication; as where a subsequent statute conflicting with it is enacted. This subject has been fully treated in a previous chapter.⁸²

245; *United States v. New Bedford Bridge*, 1 Wood. & M. 401, Fed. Cas. No. 15,867. ⁸¹ Dwarr. 478. ⁸² *Ante*, ch. VIII.

CHAPTER XII.

PARTS OF A STATUTE AND THEIR RELATIONS.

§ 339 (210). **The title.**—The English courts have always held the title to be no part of the act; it is said to be no more so than the title of a book is part of the book.¹ In strictness, Lord Coke said, it ought not to be taken into consideration at all.² It was generally framed by the clerk of the branch of parliament where the act originated, and was intended only as a convenient means of reference.³ The same declaration, that the title is no part of the act, has been frequently made by judges in this country.⁴ But

¹ *Mills v. Wilkins*, 6 Mod. 62; *Sal-keld v. Johnson*, 2 Ex. 256, 283; *Rex v. Williams*, 1 W. Bl. 93; *Attorney-General v. Weymouth*, 1 Amb. 20; *Chance v. Adams*, 1 Lord Raym. 77; *Jefferys v. Boosey*, 4 H. L. 982; *Rawley v. Rawley*, 1 Q. B. D. 466; *Bentley v. Rotherham*, 4 Ch. D. 588; *Morant v. Taylor*, 1 Ex. D. 194; *Hunter v. Nockolds*, 1 McN. & Gord. 651. In *Ex parte Liddell*, 93 Cal. 633, 635, 29 Pac. 251, the court says: "In olden times legislative titles were unknown; bills were drawn in the form of petitions, which were entered upon the parliament rolls. At the end of each parliament the judges put them in the form of a statute, and in that form they were entered on the statute rolls. It was not until the reign of Henry VI. that bills in the form of acts according to modern customs were first introduced. When titles were

first introduced there was a general one for all the acts passed in the session, but in the first year of Henry VIII. distinct titles were introduced for each chapter. Until a comparatively recent date the title of an act in this country was regarded as no part of it; but if the language of the act was ambiguous, the title might be considered in determining the intent of the legislators."

² *Attorney-General v. Weymouth*, 1 Amb. 20; *Powlter's Case*, 11 Coke, 33.

³ *Hadden v. The Collector*, 5 Wall. 107, 110, 18 L. Ed. 518; *Plummer v. People*, 74 Ill. 361.

⁴ *Bradford v. Jones*, 1 Md. 351, 370; *Commonwealth v. Slifer*, 53 Pa. St. 71; *Plummer v. People*, 74 Ill. 361, 363; *Cohen v. Barrett*, 5 Cal. 195; *State v. Stephenson*, 2 Bailey (S. C.), 334; *People v. O'Neil*, 54 Hun, 610,

in modern practice the title is adopted by the legislature, more thoroughly read than the act itself, and in many states is the subject of constitutional regulation. It is not an enacting part, but is in some sort a part of the act, though only a formal part,⁵ and this is held to be true even in states which have no constitutional provision on the subject.⁶ By the common law it could not control the plain words of a statute; it was resorted to only in cases of doubt for such aid as it could afford in removing ambiguities.⁷ Acts may

8 N. Y. S. 123; *State v. Woolard*, 119 N. C. 779, 25 S. E. 719; *United States v. McCrory*, 119 Fed. 861 (C. C. A.).

⁵ *Hadden v. The Collector*, 5 Wall. 107, 110, 18 L. Ed. 518; *Burgett v. Burgett*, 2 Ohio, 219, 221; *Plummer v. People*, 74 Ill. 361; *Ogden v. Strong*, 2 Paine, 584, Fed. Cas. No. 10,460.

⁶ *Proprietors of Mills v. Randolph*, 157 Mass. 345, 32 N. E. 153. In *Fielding v. Morley Corp.*, (1899) 1 Ch. 1, Lindley, M. R., says: "I read the title advisedly, because now, and for some years past, the title of an act of parliament has been part of the act. In old days it used not to be so, and in the old law books we were told not so to regard it; but now the title is an important part of the act, and is so treated in both houses of parliament."

⁷ *United States v. Fisher*, 2 Cr. 358, 2 L. Ed. 304; *Ogden v. Strong*, 2 Paine, 584, Fed. Cas. No. 10,460; *United States v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471; *People v. Davenport*, 91 N. Y. 574; *People v. O'Brien*, 111 id. 1, 18 N. E. 692, 7 Am. St. Rep. 684; *Hines v. R. R. Co.*, 95 N. C. 434; *Commonwealth v. Gaines*, 2 Va. Cas. 172; *Davidson v. Clayland*, 1 Har. & J. 546; *Canal Co. v. R. R. Co.*, 4 Gill & J. 1; *Kent v. Somervell*, 7 Gill & J.

265; *Lucas v. McBlair*, 12 id. 1; *Eastman v. McAlpin*, 1 Ga. 157; *State v. Cazeau*, 8 La. Ann. 109; *Cohen v. Barrett*, 5 Cal. 195; *State v. Stephenson*, 2 Bailey, 334; *Burgett v. Burgett*, 2 Ohio, 219; *Bartlett v. Morris*, 9 Port. 266; *Ins. Co. v. Stokes*, 9 Phila. 80; *Cochran v. Library Co.*, 6 id. 492; *Bailie's Case*, 1 Leach's Cas. 396; *Crespigny v. Wittenoom*, 4 T. R. 793; *Taylor v. Newman*, 4 B. & S. 89; *Coomber v. Berks*, L. R. 9 Q. B. Div. 33; *Johnson v. Upham*, 2 E. & E. 250; *Shaw v. Rudder*, 9 Irish C. L. (N. S.) 219; *Reg. v. Mallow Union*, 12 id. 35; *Free v. Burgoyne*, 5 B. & C. 400; *Allkins v. Jupe*, 2 C. P. D. 375; *Heard v. Baskerville*, Hob. 232; *Wood v. Rowcliffe*, 6 Hare, 191; *Choctaw, O. & G. R. R. Co. v. Alexander*, 7 Okl. 579, 52 Pac. 944; *Territory v. Hopkins*, 9 Okl. 133, 59 Pac. 970; *Loper v. State*, 82 Minn. 71, 84 N. W. 650; *Roland Park Co. v. State*, 60 Md. 448, 31 Atl. 298; *Dart v. Bagley*, 110 Mo. 42, 19 S. W. 311; *Knowlton v. Moore*, 178 U. S. 41, 20 S. C. Rep. 747, 44 L. Ed. 969; *White v. United States*, 191 U. S. 545; *Cornell v. Coyne*, 192 U. S. 418; *Oregon & Cal. R. R. Co. v. United States*, 67 Fed. 650, 14 C. C. A. 600, 29 U. S. App. 497; *Fielding v. Morley Corp.*, (1899) 1 Ch. 1.

be identified by the title.⁸ An act may have effect as to persons and subjects broader than the title where the words are plain, and where there is no constitutional barrier.⁹ But if the meaning is doubtful, the title, if expressive, may have the effect to resolve the doubts by extension of the purview,¹⁰ or by restraining it,¹¹ or to correct an obvious error;¹² for in ascertaining the intention nothing is to be rejected from which aid can be derived; therefore, the title of an act may claim a degree of notice, and is entitled to its share of consideration.¹³ But the title cannot enlarge or confer powers, control the plain words of the act, or extend the purview to objects mentioned in the title but not in the act.¹⁴ Where the text of the statute is plain and unambiguous, the title cannot have the effect to modify it.¹⁵

The title of a city ordinance being inessential cannot control the tenor of the enactment. *Hershoff v. Treasurer, etc.*, 45 N. J. L. 288.

⁸ *Reg. v. Wilcock*, 7 Q. B. 317; *Boothroyd, In re*, 15 M. & W. 1.

⁹ *United States v. Fisher*, 2 Cr. 358, 2 L. Ed. 304; *Powtler's Case*, 11 Coke, 33.

¹⁰ *Deddrick v. Wood*, 15 Pa. St. 9; *Ins. Co. v. Stokes*, 9 Phila. 80.

¹¹ *Cochran v. The Library Co.*, 6 Phila. 492; *Yeager v. Weaver*, 64 Pa. St. 425; *United States v. Palmer*, 3 Wheat. 610, 631, 4 L. Ed. 471; *State v. Stephenson*, 2 Bailey, 334; *Field v. Gooding*, 106 Mass. 310; *Brett v. Brett*, 3 Addams, 219.

¹² *Wilson v. Spaulding*, 19 Fed. Rep. 304.

¹³ *United States v. Fisher*, 2 Cranch, 358, 2 L. Ed. 304; *Deddrick v. Wood*, 15 Pa. St. 9; *Savings Bank v. Burns*, 104 Cal. 473, 38 Pac. 102; *Hogan v. Akin*, 181 Ill. 448, 55 N. E. 137; *Proprietors of Mills v. Randolph*, 157 Mass. 345, 32 N. E. 153; *People v. Coleman*, 121 N. Y. 542, 25

N. E. 51; *People v. Fidelity & Casualty Co.*, 153 N. Y. 25, 38 N. E. 752; *Hempstead v. New York*, 52 App. Div. 182, 65 N. Y. S. 14; *State v. Woolard*, 119 N. C. 779, 25 S. E. 719; *Nolan v. Milwaukee, etc. R. R. Co.*, 91 Wis. 16, 64 N. W. 319; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 S. C. Rep. 511, 36 L. Ed. 226. In *State v. Woolard*, 119 N. C. 779, 25 S. E. 719, the act in question was entitled "An act to amend chapter 504, Laws of 1889." The body of the act simply amended chapter 504 without any description to identify it. It was held that this would be made certain by reference to the title.

¹⁴ *United States v. McCrory*, 119 Fed. 861, 56 C. C. A. 373; *The New York*, 108 Fed. 102, 47 C. C. A. 232; *United States v. Oregon & Cal. R. R. Co.*, 164 U. S. 526, 17 S. C. Rep. 165, 41 L. Ed. 541.

¹⁵ *Boston Min. Co., In re*, 51 Cal. 624; *Commonwealth v. Slifer*, 53 Pa. St. 71; *Pickering v. Arrick*, 20 D. C. Rep. 169, 9 Mackey, 169; *Eto-*

§ 340 (211). The constitutional provision that no law shall embrace more than one subject, and requiring that to be expressed in the title, has given the title of legislative acts more importance.¹⁶ It is not, however, required or intended that the title shall contain a full index to all the contents of the law; it is permitted to be general in its terms, and therefore it will seldom occur that it will afford a clue to the intention when the text of the statute is uncertain. But the title of an act is now so associated with it in the process of legislation that when, in performing its constitutional functions, it affords means of determining the legislative intent, in cases of doubt its help cannot be rejected for being extrinsic and extra-legislative.¹⁷ The language of an act should be construed in view of its title and its lawful purposes; broad language should be confined to lawful objects.¹⁸ The subject or object expressed in the title fixes

wah Milling Co. v. Crenshaw, 116 Ga. 406, 42 S. E. 709; People v. O'Neil, 54 Hun, 610, 8 N. Y. S. 123; Choctaw, O. & G. R. R. Co. v. Alexandria, 7 Okl. 579, 52 Pac. 944; Territory v. Hopkins, 9 Okl. 133, 59 Pac. 970; Patterson v. Bark Eudora, 190 U. S. 169.

¹⁶ Boston Min. Co., In re, 51 Cal. 624; Cooley, C. L., p. 172; *ante*, ch. IV.

¹⁷ People v. Wood, 71 N. Y. 371, 374; Hadden v. The Collector, 5 Wall. 107, 18 L. Ed. 518; People v. Molyneux, 40 N. Y. 113, 53 Barb. 9; Bishop v. Barton, 2 Hun, 436; People v. Davenport, 91 N. Y. 574; Wilson v. Spaulding, 19 Fed. 304; Torreyson v. Board of Examiners, 7 Nev. 19; Smith v. State, 28 Ind. 321; Garrigus v. Board of Com'rs, 39 Ind. 66; Hines v. Railroad Co., 95 N. C. 434; Commonwealth v. Slifer, 53 Pa. St. 71; Bradford v. Jones, 1 Md. 370; Connecticut, etc.

Ins. Co. v. Albert, 39 Mo. 181; Battle v. Shivers, 39 Ga. 405; Nazro v. Merchants' M. Ins. Co., 14 Wis. 295; Dodd v. State, 18 Ind. 56; Flynn v. Abbott, 16 Cal. 358; Garvin v. State, 13 Lea, 162; Harper v. State, 109 Ala. 28, 19 So. 857; State v. Green, 36 Fla. 154, 18 So. 334; Cohn v. People, 149 Ill. 486, 37 N. E. 60, 41 Am. St. Rep. 304, 23 L. R. A. 821; Canal Commissioners v. Sanitary District, 184 Ill. 597, 56 N. E. 953; Rushville v. Rushville Natural Gas Co., 123 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Commonwealth v. Barney, 24 Ky. L. R. 2352, 74 S. W. 181; Fillmore v. Van Horn, 129 Mich. 52, 88 N. W. 69; State v. O'Connor, 81 Minn. 79, 83 N. W. 498; Dart v. Bagley, 110 Mo. 42, 19 S. W. 311; State v. Moore, 45 Neb. 12, 63 N. W. 130; State v. Gloucester County, 50 N. J. L. 585, 15 Atl. 272; State v. Robinson, 32 Ore. 43, 48 Pac. 357.

¹⁸ Allor v. Wayne Co. Auditors.

a limit to the scope of the act, and provisions not germane but foreign to such subject will be excluded as unconstitutional and void.¹⁹ The supreme court of Kentucky, in speaking of the title of an act, says: "It is essentially a part of the act, not only because it has been selected and adopted by the legislature as one of the tests of their meaning as expressed in the bill, but because the constitution has made it a part, and the controlling part, of the law to which it applies. It is therefore not only useful in affording a fair index of the legislative intent, in case of ambiguity in the context, but it must be read in connection with the remainder of the act, as a part of it, in determining what is the law."²⁰

§ 341 (212). **The preamble.**—The preamble in a statute is a prefatory statement or explanation. It purports usually to state the reason or occasion for making the law to which it is prefixed. It accompanies the bill through the process of enactment, and thus emanates from the law-maker. It is not part of the law, in the legislative sense, and hence can never enlarge the scope of a statute; it cannot of itself confer any power. Its true office is to expound powers conferred, not substantially to create them.²¹ But it is a guide of some importance to the intention of the legislature. It is "a good means," says Lord Coke, "to find out the meaning of the statute, and is a true key to open the understanding thereof."²² This affirms that it has very considerable value in interpreting the statute, but it does not define precisely its force for that purpose. Lord Tenterden thus expressed himself on the same subject: "In construing acts of

43 Mich. 76, 97, 4 N. W. 492; *Singer v. State*, 57 N. J. L. 348, 30 Atl. 480; *Jones v. Morristown*, 66 N. J. L. 488, 49 Atl. 440; *ante*, § 135.
 M. Co. v. Graham, 8 Ore. 17, 34 Am. Rep. 572; *State v. Hartford Fire Ins. Co.*, 99 Ala. 221, 13 S. E. 362;
 19 *Ante*, §§ 145, 158.
Conley v. State, 85 Ga. 348, 11 S. E. 20 *Commonwealth v. Barney*, 24 Ky. L. R. 2352.
 659; *McDuffie v. State*, 87 Ga. 687, 13 S. E. 596; *Bell v. State*, 91 Ga. 227, 18 S. E. 288; *Pittsburg v. Reynolds*, 48 Kan. 360, 29 Pac. 757;
 21 *Story, Com. on Const.*, § 459; *Wilson v. Knubley*, 7 East, 128.
 22 *Co. Litt. 79a*; *Plowd. 369*.

parliament we are to look not only to the language of the preamble, or of any particular clause, but at the language of the whole act; and if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act we can collect from the more large and extensive expressions used in other parts the real intention of the legislature, it is our duty to give effect to the large expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause.”²³ He seems to place the preamble on an equal footing with any particular clause of the act itself; leaving it to be inferred that it is to be considered within the rule requiring every part of an act to be considered in determining its meaning. The supreme court of Alabama says: “The preamble to an act neither confers nor restricts powers, rights, privileges or duties, and, strictly speaking, is no part of the act itself. . . . If the legislative intent is clearly expressed in the preamble, and the body of the act is so constructed as to render its meaning and intent uncertain; and if the act admits of two constructions, one in accord with the intent clearly expressed in the preamble, and the other in conflict with it, courts should adopt that construction which harmonizes with the preamble.”²⁴

The established doctrine seems to be that if, on reading the enacting part, there is no ambiguity or doubt as to its scope or meaning, there can be no recourse to either the title or preamble in search of a different meaning. “This is the case where the words are plain without any scruple, and absolute without any saving.”²⁵ And then the preamble cannot restrain or extend the import of the enacting clause.²⁶ The preamble cannot be permitted to introduce

²³ *Bywater v. Brandling*, 7 B. & C. 643.

²⁴ *White v. Levy*, 91 Ala. 175, 8 So. 563.

²⁵ *Co. Inst.* 533.

²⁶ *Colehan v. Cooke*, Willes, 395; *Holbrook v. Holbrook*, 1 Pick. 248; *Jackson v. Gilchrist*, 15 John. 89; *Emanuel v. Constable*, 3 Russ. 436; *Taylor v. Oldham Corporation*, L. R.

doubt or uncertainty where otherwise it would not exist.²⁷ An act cannot be declared unconstitutional for matter contained in the preamble, the text of the statute itself being free from constitutional objection.²⁸ When the legislature passes an act within its powers, a statement of its reasons in the preamble will not affect the validity of the act.²⁹ But where there is uncertainty, ambiguity or doubt on the language of the statute itself, the preamble may aid as far as it can to ascertain the legislative intent.³⁰ Where there is such generality in the text of the statute as renders it ambiguous as to scope, the preamble may be referred to to determine whether such general language is to have the most extensive or only a restricted operation; for the purpose of the preamble is to state the reason and object of the law.³¹ The preamble may explain an equivocal expression used in the enacting part, but it can never control its obvious meaning, nor supply matter not within the spirit and mean-

4 Ch. Div. 395; *Bentley v. Rotherham L. Board*, id. 588; *Crespigny v. Wittenoom*, 4 T. R. 790; *Lees v. Summersgill*, 17 Ves. 508; *Mason v. Armitage*, 13 id. 36; *Copland v. Davies*, L. R. 5 H. L. Cas. 358; *Clark v. Bynum*, 3 McCord, 298; *Covington v. McNickle*, 18 B. Mon. 262; *Rex v. St. Peter & St. Paul in B.*, 1 Bott, 443.

²⁷ *James v. Du Bois*, 16 N. J. L. 285; *Bac. Abr.*, tit. Statutes, I, 7; *MacDonald v. New York, etc. R. R. Co.*, 23 R. I. 558, 51 Atl. 578.

²⁸ *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 108.

²⁹ *Lothrop v. Stedman*, 42 Conn. 583.

³⁰ *County of York v. Crafton*, 100 Pa. St. 619; *Yazoo R. R. Co. v. Thomas*, 132 U. S. 174, 10 S. C. Rep. 68, 33 L. Ed. 502; *Beard v. Rowan*, 9 Pet. 301, 317, 9 L. Ed. 135; *Jackson v. Gilchrist*, 15 John. 89; *Con-*

stantine v. Van Winkle, 6 Hill, 177, 184; *Brett v. Brett*, 3 Addams, 210; *Deddrick v. Wood*, 15 Pa. St. 9; *Bywater v. Brandling*, 7 B. & C. 643; *Kearns v. Cordwainers' Co.*, 6 C. B. (N. S.) 388; *State v. Cazeau*, 8 La. Ann. 109; *United States v. Webster*, Davies, 38, Fed. Cas. No. 16,658; *Blue v. McDuffie*, *Busbee L.* (N. C.) 131; *Nash v. Allen*, 4 Q. B. 784; *Crowder v. Stewart*, L. R. 16 Ch. Div. 370; *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *Fraim v. Lancaster County*, 171 Pa. St. 436, 33 Atl. 339; *In re Benezet Joint Stock Ass'n*, 17 Phila. 215; *Barr's Estate*, 21 Pa. Co. Ct. 223; *Tripp v. Goff*, 15 R. I. 299, 3 Atl. 591; *MacDonald v. New York, etc. R. R. Co.*, 23 R. I. 558, 51 Atl. 578; *Price v. Forest*, 173 U. S. 410, 19 S. C. Rep. 434, 43 L. Ed. 749.

³¹ *United States v. Webster*, Davies, 38, Fed. Cas. No. 16,658.

ing of the statute itself.³² It may, in this sense, be referred to in the construction of a statute to which it was prefixed after its enactment without it.³³ The generality of the enacting part must be such as to amount to ambiguity, or be such as to suggest a doubt, to justify restraining it for matter in the preamble.³⁴ The very subject-matter, without a preamble, may have the effect to limit general language.³⁵

§ 342 (213). The legislature cannot bind itself by a preamble, nor even by a statute, so as to impair its continuing power to legislate; hence, one provision of an act will prevail against another which is inconsistent and precedes it in the same act; *a fortiori* against a conflicting declaration in the preamble. The conflict between two provisions of the act must be obvious and inveterate to justify the conclusion that the latter repeals the earlier.³⁶ The conflict of a provision in the act itself with the preamble will not signify, unless there is some obscurity or doubt as to the scope or meaning of the former, read alone. A clear and explicit enactment is not cut down by a more limited preamble or recital,³⁷ even though the enacting clause is in general words and the preamble particular.³⁸ Strong words in the enacting part of a statute may extend it beyond the preamble.³⁹ Though the preamble is generally a key to the statute, yet it does not always open all parts of it. Sometimes the legislature, having a particular mischief in view, to prevent

³² Clark v. Bynum, 3 McCord, 298; Copeman v. Gallant, 1 P. Wms. 314; Lackland v. Walker, 151 Mo. 210, 52 S. W. 414; In re Benezet Joint Stock Ass'n, 17 Phila. 215; Price v. Forest, 173 U. S. 410, 19 S. C. Rep. 431, 43 L. Ed. 749.

³³ Goldsmid v. Hampton, 5 C. B. (N. S.) 94.

³⁴ Trueman v. Lambert, 4 M. & S. 238; Hughes v. Done, 1 Q. B. 301.

³⁵ Saikeld v. Johnston, 1 Hare, 196; Henderson v. Bise, 3 Starkie, 158; Elsworth v. Cole, 2 M. & W. 31.

³⁶ Ante, § 258.

³⁷ Hughes v. Chester, etc. Ry. Co., 1 Drew. & Sm. 524; Kearns v. Cordwainers' Co., 6 C. B. (N. S.) 388-408; Greig v. Bendeno, El. Bl. & El. 133; Barton v. Hannant, 3 B. & S. 16; Jackson v. Gilchrist, 15 John. 89; Treasurers v. Lang, 2 Bailey, 430.

³⁸ Bac. Abr., tit. Statutes, I; Treasurers v. Lang, *supra*.

³⁹ Pattison v. Bankes, 2 Cowper, 543; Rex v. Marks, 3 East, 160.

which was the first and immediate object of the statute, recites that in the preamble, and then goes on in the body of the act to provide a remedy for general mischiefs of the same nature but of different species, not expressed in the preamble nor perhaps then in contemplation.⁴⁰

⁴⁰ *State v. Ohio Oil Co.*, 150 Ind. 21, 32, 33, 49 N. E. 809, 47 L. R. A. 627; *Windsor v. Des Moines*, 110 Iowa, 175, 81 N. W. 476, 80 Am. St. Rep. 280; *Mace v. Cammel*, Lofft. 782; *Holbrook v. Holbrook*, 1 Pick. 248; *Colehan v. Cook*, Willes, 395. In *State v. Cazeau*, 8 La. Ann. 109, the court say: "The title of the law is: 'An act to authorize equitable assignees to sue in their own names;' and the words of the preamble are, 'whereas equitable assignees have frequently sustained injuries and loss by the death of assignors, or legal plaintiff,' which are supposed to have the effect to restrict the broad words of the enacting clause, and to confine them to the case of an assignee whose assignor has died without making an executor, and on whose estate there is no administration. It is admitted that where the words of the enacting clause are of double meaning and the mind is at a loss to discover their true construction, and determine what it is that they embrace, it seizes upon anything from which assistance can be derived, and in that effort looks to the title or preamble (if there be one), or to both, in search of the aid it requires; by which many a key is sometimes found, to open the door to the intention of the legislature, that otherwise would be locked up in obscurity. In such a case and for that purpose, the pre-

amble, or the title, has a claim to consideration. But its office is auxiliary only, and stops there; and neither to be invoked for the purpose of restricting and controlling plain and unambiguous words in the enacting clause or body of the law. A preamble, it must be admitted, sometimes mistakes, or does not fully state, the whole object of the legislature; and where the words in the body of the law, taken in their plain obvious and natural sense as there found, embrace a subject not stated in the preamble, the preamble is not to control, and narrow them down to its own restricted limits; but if looked to at all, it is to be considered as not stating the entire object of the legislature. Though where the words used in the body of the law are in themselves ambiguous, and require the aid of the preamble to give them application, it may for that purpose be resorted to.

"In this case the words of the title are co-extensive with the words of the enacting clause, and although the preamble recites that equitable assignees have frequently sustained injuries and loss by the death of the assignor, or legal plaintiff, yet it does not declare that case to be the only subject intended to be legislated upon. And the words of the enacting clause, 'any assignee or assignees,' plainly and clearly embracing, according

Though the preamble of one act may appear to be directed against a particular evil, and though another act may be passed to aid its application, the provisions of the second act are not necessarily to be confined to the special purpose which seemed to be the particular object which the first had in view. Its own words must be considered as explaining and defining its object and its meaning.⁴¹ It has been stated to be a general rule that the preamble may extend, but cannot restrain, the effect of the enacting clause.⁴² In a late English case it was held: "We are to give effect to the preamble to this extent, namely, that it shows us what the legislature was intending; and if the words of the enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material."⁴³ We ought not to restrict a section in an act by the preamble where the section is not inconsistent with the spirit of the act.⁴⁴ While an enactment is conclusive as to the facts it states

to their natural and ordinary meaning, any assignee, whether the assignor be dead, with or without an executor, or administration upon his estate, they are not to be restricted to the recital in the preamble. But effect is to be given to the plain words of the legislature expressed in the enacting clause, as embracing not merely the subject of the recital in the preamble, but extending beyond the recital, and embracing every other case comprehended within their clear meaning, without resorting to the preamble, for the purpose of restricting or controlling them; no explanation of their meaning or application being required by any

ambiguity in the body of the law. And particularly when it is not perceived that any mischief can be done, by giving effect to the words in the body of the law, according to their natural plain meaning and import." See *Mayor, etc. v. Moore*, 6 Harris & J. 375; *Kent v. Somervell*, 7 Gill & J. 265.

⁴¹ *Copland v. Davies*, L. R. 5 H. L. Cas. 358.

⁴² *Kearns & Cordwainers' Co.*, 6 C. B. (N. S.) 388.

⁴³ Per Lord Blackburn, *West Ham Overseers v. Iles*, L. R. 8 App. Cas. 386.

⁴⁴ *Sutton v. Sutton*, L. R. 22 Ch. Div. 511.

against those who are within its operation, though not as to such as are not within its enacting part,⁴⁵ a mere recital in a statute, either of fact or of law, is not conclusive. A court is at liberty to decide the law differently, and to inquire independently as to the truth of the recited facts.⁴⁶

§ 343 (214). *The enacting style.*— This part of a statute has been discussed in a previous section with reference to its materiality to the validity of an act.⁴⁷ It indicates from what authority the law emanates, and hence its jurisdiction; but that is always recognized and the law identified as passed by a determinate legislative body constitutionally created to legislate for the territory or country where such law is supposed to operate, before any question of interpretation arises. The reference in the style to the enacting power is only useful as an announcement of the authority which commands in the act. When interpretation begins, that legislative jurisdiction is always taken for granted and in view, subject to the limitations imposed by the paramount law.

⁴⁵ See *Edinburgh, etc. R. R. Co. v. Linlithgow*, 3 Macq. H. L. Cas. 704; *Perry v. Newsom*, 1 Ired. Eq. 28; 3 Atk. 304; Cowp. 698.

⁴⁶ *Goody Koontz v. Acker*, 19 Colo. 360, 35 Pac. 911; *Mitchell v. Lasserter*, 114 Ga. 275, 40 S. E. 238; *Kinhead v. United States*, 150 U. S. 483, 14 S. C. Rep. 172, 37 L. Ed. 1152; *Regina v. Haughton*, 1 El. & Bl. 501; *Board of Com'rs v. State*, 9 Gill, 379-400; *State v. Reed*, 4 H. & McH. 10; *Duncombe v. Prindle*, 12 Iowa, 1. See *Rex v. Sutton*, 4 M. & S. 532. An inquiry by the legislature into the affairs of a corporation with reference to a repeal of its charter is not a judicial act. *Lothrop v. Stedman*, 42 Conn. 583. A party is not estopped to deny

facts recited in an act of the legislature. So far as the facts recited are concerned it is no law, and the court is not bound to take judicial cognizance of it. The investigation of facts belongs to the judicial department. The court: "The legislature has no power to legislate the truth of facts. Whether facts upon which rights depend are true or false is an inquiry for the courts to make under legal forms; it belongs to the judicial department of the government." *Dougherty v. Bethune*, 7 Ga. 90; *Thornton v. Lane*, 11 Ga. 459. See *People v. Tyler*, 7 Mich. 161, 74 Am. Dec. 703; *People v. Lawrence*, 36 Barb. 177.

⁴⁷ *Ante*, § 72.

§ 344 (215). **The purview; one part to be construed by another.**—The enacting part of a law is comprehensively termed its purview. It has been defined to be that part of an act of the legislature which begins with the words "Be it enacted," etc., and ends with the repealing clause.⁴⁸ It is not unfrequently used, however, to indicate the providing part only, and, therefore, excluding exceptions, provisos and saving clauses; it is used to refer to such providing part in distinction from such restrictive clauses.⁴⁹ It is to be presumed that all the subsidiary provisions of an act harmonize with each other, and with the purpose of the law; if the act is intended to embrace several objects, that they do not conflict. Therefore it is an elementary rule of construction that all the parts of an act relating to the same subject should be considered together, and not each by itself.⁵⁰ By

⁴⁸ Bouv. Law Dic., tit. Purview; Bish. W. L., § 52.

⁴⁹ The San Pedro, 2 Wheat. 182, 4 L. Ed. 202. Dwarrris says: "The parts of statutes are—in a popular, though not legal sense—the title, the preamble, the purview or body of the act, clauses, provisos, exceptions." Dwar. Stat. (2d ed.) 500.

⁵⁰ Co. Litt. 381a; Little Rock, etc. R. R. Co. v. Howell, 31 Ark. 119; Wilson v. Biscoe, 11 Ark. 44; Strode v. Stafford Justices, 1 Brock. 162; Ellison v. Mobile, etc. R. R. Co., 36 Miss. 572; Swann v. Buck, 40 id. 304; City Bank v. Huie, 1 Rob. 236; United States v. Hawkins, 4 Mart. (N. S.) 317; Mayor v. Howard, 6 Har. & J. 388; Harrell v. Harrell, 8 Fla. 46; State v. Atkins, 35 Ga. 315; Potter v. Safford, 50 Mich. 46, 14 N. W. 694; Reithmiller v. People, 44 Mich. 280, 284, 6 N. W. 667; Van Fleet v. Van Fleet, 49 Mich. 610, 14 N. W. 566; People v. Burns,

5 Mich. 114; Harrison, Ex parte, 4 Cow. 63; Kelley's Heirs v. McGuire, 15 Ark. 555; Pennington v. Coxe, 2 Cranch, 33, 2 L. Ed. 199; Rice v. Railroad Co., 1 Black, 358, 17 L. Ed. 147; Atkins v. Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841; Wilkinson v. Leland, 2 Pet. 627, 7 L. Ed. 542; Mason v. Finch, 3 Ill. 223; Belleville R. R. Co. v. Gregory, 15 id. 20, 18 Am. Dec. 589; Burke v. Monroe Co., 77 Ill. 610; Thompson v. Bulson, 78 id. 277; Williams v. People, 17 Ill. App. 274; United States v. Bassett, 2 Story, 389, Fed. Cas. No. 14,539; Ogden v. Strong, 2 Paine, 584, Fed. Cas. No. 10,460; Holbrook v. Holbrook, 1 Pick. 248; Commonwealth v. Alger, 7 Cush. 53; Mendon v. Worcester, 10 Pick. 235; Commonwealth v. Cambridge, 20 id. 267; San Francisco v. Hazen, 5 Cal. 169; Taylor v. Palmer, 31 id. 240; Gates v. Salmon, 35 id. 576; Davey v. Burlington, etc. R. R.

such a reading and consideration of a statute its object or general intent is sought for, and the consistent auxiliary effect of each individual part. Flexible language which may be used in a restricted or extensive sense will be construed to make it consistent with the purpose of the act and the intended modes of its operation as indicated by such general intent, survey and comparison — *ex antecedentibus et consequentibus fit optima interpretatio*.⁵¹ The order in which provisions occur in a statute is immaterial where the meaning is plain and there is not a total conflict. A later clause or provision may qualify an earlier one, and the converse is equally true.⁵²

§ 345 (216). Exceptions, provisos, interpretation, repealing and saving clauses are often introduced to restrict or qualify the effect of general language, remove possible obscurities that might otherwise exist, and render the law more precise. These will be presently considered. But one provision may be qualified by another, though it does not profess to have that effect. Words expressive of a particular intent incompatible with other words expressive of a general intent will be construed to make an exception, so that all parts of the act may have effect.⁵³ The context may thus serve to engraft an exception by implication to dispose of an apparent conflict; to restrict general words,

Co., 31 Iowa, 553; *Berry v. Clary*, 77 Me. 482, 1 Atl. 360; *Brooks v. Commissioners*, 31 Ala. 227; *State v. Mayor, etc.*, 35 N. J. L. 197; *Canal Co. v. Railroad Co.*, 4 Gill & J. 1; *Magruder v. Carroll*, 4 Md. 335; *Alexander v. Worthington*, 5 id. 471; *Parkinson v. State*, 14 id. 184, 74 Am. Dec. 522; *Stockett v. Bird*, 18 Md. 484; *Commonwealth v. Duane*, 1 Binn. 601; *Commonwealth v. Conyngham*, 66 Pa. St. 99; *Holl v. Deshler*, 71 id. 299; *Catlin v. Hull*, 21 Vt. 152; *Ryegate v. Wardsboro*, 30 id. 746; *Maple Lake v. Wright*

Co., 12 Minn. 403; *Gas Co. v. Wheeling*, 8 W. Va. 320; *Scott v. State*, 22 Ark. 369; *Torrance v. McDougald*, 12 Ga. 526; *Covington v. McNickle*, 18 B. Mon. 269; *Ruggles v. Washington Co.*, 3 Mo. 496; *State v. Weigel*, 48 id. 29; *Green v. Cheek*, 5 Ind. 105; *Crone v. State*, 49 id. 538.

⁵¹ *Holl v. Deshler*, 71 Pa. St. 299; *Rogers v. Rogers*, 3 Wend. 503, 526.

⁵² *Gibbons v. Brittenum*, 56 Miss. 239; *Endlich*, §§ 38, 182.

⁵³ *Churchill v. Crease*, 5 Bing. 177, 180; *Stockett v. Bird*, 18 Md. 484.

to limit them to the subject-matter of the act, or to expand words beyond their natural import if taken alone. A few cases will be given to illustrate these points.

§ 346 (217). **Partial conflict resolved into an exception.**—The law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it.⁵⁴ But, in the nature of things, contradictions cannot stand together.⁵⁵ Where there is an act or provision which is general, and applicable actually or potentially to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment.⁵⁶ The general act would operate according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act.⁵⁷ That would be deemed an exception, unless the terms of the later general law manifested an intention to exclude the exception. If the general and special provisions are in the same act, or passed on the same day in separate acts, or at the same session of the legislature, the presumption is stronger that both are intended to operate. In adjusting the general provisions in a general act to the particular provisions of a special act, considerations of reason and justice, and the universal anal-

⁵⁴ *Lyn v. Wyn*, Bridg. 122.

⁵⁵ *Re Hickory Tree Road*, 43 Pa. St. 139, 143.

⁵⁶ *Ante*, § 274.

⁵⁷ *Crane v. Reeder*, 22 Mich. 322; *Felt v. Felt*, 19 Wis. 193; *State v. Goetze*, 22 id. 363; *Elton v. Geisert*, 10 Phila. 330; *Long v. Culp*, 14 Kan. 412; *Warren v. Shuman*, 5 Tex. 441; *Pretty v. Solly*, 26 Beav. 606; *Taylor v. Oldham Corporation*, L. R. 4 Ch. Div. 395; *Gregory's Case*, 6 Rep. 196; *Foster's Case*, 11

Rep. 586; *Martin v. Election Commissioners*, 126 Cal. 404, 58 Pac. 932; *Hall v. State*, 39 Fla. 637, 23 So. 119; *Poor v. Watson*, 92 Mo. App. 89; *State v. Cornell*, 53 Neb. 556, 74 N. W. 59, 68 Am. St. Rep. 629; *Hoey v. Gilroy*, 129 N. Y. 132, 29 N. E. 85; *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524; *Portland v. Gaston*, 38 Ore. 533, 63 Pac. 1051; *Hayes v. Arrington*, 108 Tenn. 494, 68 S. W. 44; *People v. Utah Com'rs*, 7 Utah, 279, 26 Pac. 577.

ogy of such provisions in similar acts, are proper to be borne in mind, and ought to have much weight and force.⁵⁸ A local act provided that the auditor of a particular county should receive an annual salary of \$700 in full for his official services. On the following day a general act was passed imposing additional duties on auditors; and it provided a compensation by a percentage on certain funds. It was held that these were to be construed as one act, and that the first act exclusively controlled as to the particular county.⁵⁹ A general act made the term of revenue commissioners four years; by another act, passed the same day, the charter of a particular city was amended so as to make the official term of its revenue commissioners two years; it was held that this amendment made a special exception to the general rule.⁶⁰ If an act in one section authorizes a corporation to sell a particular piece of land, and in another prohibits it from selling any land, the first section is not repealed, but will be treated as creating an exception.⁶¹ An absolute direction in one section to set off for a widow and children the decedent's homestead, free from all his debts, though absolute in terms, was held qualified by a subsequent section, which in terms embraced such homestead, subjecting it to debts contracted prior to the passage of the act.⁶²

§ 347 (218). Words expanded or limited to accord with intent.—It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it.⁶³ When the subject-matter is once clearly ascertained and its general intent, a

⁵⁸ Metropolitan District Ry. Co. v. Sharpe, L. R. 5 App. Cas. 431.

⁵⁹ La Grange v. Cutler, 6 Ind. 354; St. Martin v. New Orleans, 14 La. Ann. 113.

⁶⁰ Branham v. Long, 78 Va. 352; State v. Trenton, 38 N. J. L. 64.

⁶¹ Per Romilly, M. R., in De Win-

ton v. Mayor of Brecon, 28 L. J. Ch. 600; 26 Beavan, 533.

⁶² Simonds v. Powers, 28 Vt. 354.

⁶³ Olive v. Walton, 33 Miss. 114; Green v. Weller, 32 Miss. 650; Burr v. Dana, 22 Cal. 11; Woodruff v. State, 3 Ark. 285; Wassell v. Tunah, 25 id. 101; Green v. State, 59 Md. 123, 43 Am. Rep. 542.

key is found to all its intricacies;—general words may be restrained to it, and those of narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention.⁶⁴ Thus in the construction of a temporary appropriation act the presumption is that any special provisions of a general character therein contained are intended to be restricted in their operation to the subject-matter of the act, and not permanent regulations, unless the intention of making them so is clearly expressed.⁶⁵ In an act giving to pilots a lien upon vessels, though the statute was general, it was held not intended to apply to men-of-war of the United States, because the remedy provided could not be applied.⁶⁶ General words may be cut down when a certain application of them would antagonize a settled policy of the state.⁶⁷ The provision in a general repealing act that “no offense committed or penalty incurred previous to the time when any statutory provision shall be repealed shall be affected by such repeal,” was construed as relating solely to laws repealed by that act.⁶⁸ In the *Eureka Case*,⁶⁹ Mr. Justice Field said: “Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The inquiry, where any

⁶⁴ *Quin v. O’Keeffe*, 10 Ir. C. L. (N. S.) 393; *Nuth v. Tamplin*, L. R. 8 Q. B. Div. 253; *Wainwright, In re*, 1 Phil. 258; *Brinsfield v. Carter*, 2 Ga. 150; *Blanchard v. Sprague*, 3 Sumn. 279, Fed. Cas. No. 1517; *Cope v. Doherty*, 2 De G. & J. 614; *Shoemaker v. Lansing*, 17 Wend. 327; *People v. Commissioners*, 3 Hill, 601; *Bishop v. Barton*, 2 Hun, 436; *Matthews v. Commonwealth*, 18 Gratt. 989; *Taylor v. McGill*, 6 Lea, 294; *Milburn v. State*, 1 Md. 17; *State v. King*, 44 Mo. 283; *Wheeler*

v. McCormick, 8 Blatchf. 267, Fed. Cas. No. 17,498; *Attorney-General v. Kwok-A-Sing*, L. R. 5 P. C. 179.

⁶⁵ *United States v. Jarvis, Davies*, 274, Fed. Cas. No. 15,468; *Minis v. United States*, 15 Pet. 445, 10 L. Ed. 791.

⁶⁶ *Ayers v. Knox*, 7 Mass. 306; *Mayor, etc. v. Root*, 8 Md. 95.

⁶⁷ *Greenhow v. James*, 80 Va. 636.

⁶⁸ *Mongeon v. People*, 55 N. Y. 613.

⁶⁹ 4 *Sawyer*, 302, 317, Fed. Cas. No. 4548.

uncertainty exists, always is as to what the legislature intended, and when that is ascertained it controls. In a recent case before the supreme court of the United States, singing birds were held not to be live animals within the meaning of a revenue act of congress.⁷⁰ And in a previous case, arising upon the construction of the Oregon donation act of congress, the term, a single man, was held to include in its meaning an unmarried woman.⁷¹ In the dower act of the 3 and 4 Will. IV., chapter 105, the word *land*, defined to include manors, messuages and all other hereditaments both corporeal and incorporeal, except such as are not liable to dower, was held not to include copyhold lands, because it provides that the widow shall not be entitled to dower when *the deed* by which the land was conveyed to her husband contains a declaration to that effect. That provision showed that only land so transferable was in contemplation of the legislature.⁷² An act for raising state taxes provided for a certain tax on railroads on the basis of passengers, and that they should not be assessed with any tax on their lands, buildings or improvements. This exemption was confined to taxes of the kinds provided for in the act, and it was held it did not conflict with another act providing for municipal taxation.⁷³ In determining the scope of general provisions there is a leaning to prevent absurdity, for it cannot be deemed intended; ⁷⁴ also injustice, for like reason.⁷⁵

⁷⁰ *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566.

⁷¹ *Silver v. Ladd*, 7 Wall. 219, 19 L. Ed. 138.

⁷² *Smith v. Adams*, 5 De G. M. & G. 719.

⁷³ *Orange, etc. R. R. Co. v. Alexandria*, 17 Gratt. 176.

⁷⁴ *State v. Clark*, 5 Dutcher, 96; *Commonwealth v. Loring*, 8 Pick. 370; *Bailey v. Commonwealth*, 11 Bush, 688; *Henry v. Tilson*, 17 Vt. 479; *Plumstead Board of Works v. Spackman*, L. R. 13 Q. B. Div. 878.

⁷⁵ *Murray v. Gibson*, 15 How. (U. S.) 421, 14 L. Ed. 755; *Robinson v. Varnell*, 16 Tex. 382; *Meade v. Deputy Marshal*, 1 Brock. 324; *Commonwealth v. Slack*, 19 Pick. 304. In *Commercial Bank v. Foster*, 5 La. Ann. 516, the provision of a bank charter that if the bank should suspend or refuse payment, the holder should be entitled to interest from the time of the suspension until payment, did not apply after resumption; that interest would then cease. The object of the stat-

§ 348 (219). Not only may the meaning of words be restricted by the subject-matter of an act or to avoid repugnance with other parts, but for like reasons they may be expanded. The application of the words of a single provision may be enlarged or restrained to bring the operation of the act within the intention of the legislature, when violence will not be done by such interpretation to the language of the statute.⁷⁶ The propriety and necessity of thus construing words are most obvious and imperative when the purpose is to harmonize one part of an act with another in accord with its general intent. The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from a reading of its provisions, and all its parts may be brought into harmony therewith, that intent will prevail without resorting to other aids for construction.⁷⁷ The intention of an

ute was then answered, and the penalty could only be exacted for the time the bank was in default. A statute of Mississippi declares that the statute of limitation shall not apply to notes, bills or evidences of debt issued by any bank or moneyed corporation. The court: "While the general rule is that statutes of limitation do not apply to bank-bills, because they are by the consent of mankind and course of business considered as money, and that their date is no evidence of the time when they were issued, as they are being continually returned and issued by the banks, yet if such bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character from other contracts which excepts them from the operation of the statutes of limitation. *Butts v. Vicksburg,*

etc. R. R. Co., 63 Miss. 463; 2 Danl. on Neg. Inst., § 1684; Kimbro v. Bank of Fulton, 49 Ga. 419." *Clark's Succession, 11 La. Ann. 124; United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278; Reiche v. Smythe, 13 Wall. 162, 20 L. Ed. 566; Ellis, Ex parte, 11 Cal. 222; McLelland v. Shaw, 15 Tex. 319.*

⁷⁶ *Maxwell v. Collins, 8 Ind. 38, 40; Quin v. O'Keeffe, 10 Ir. C. L. (N. S.) 393; Wainwright, In re, 1 Phil. 258; Brinsfield v. Carter, 2 Ga. 150; Cope v. Doherty, 2 De G. & J. 614; Collins v. Welch, L. R. 5 C. P. Div. 29; Richards v. McBride, L. R. 8 Q. B. Div. 119; Metropolitan B'd of Works v. Steed, id. 445; Sams v. King, 18 Fla. 557.*

⁷⁷ *Green v. Weller, 32 Miss. 650; Smith v. Bell, 10 M. & W. 378; Stephenson v. Higginson, 3 H. L. Cas. 638; Sussex Peerage, 11 Cl. & F. 85; Cearfoss v. State, 42 Md. 406; Scaggs v. Baltimore, etc. R. R. Co.,*

act will prevail over the literal sense of its terms.⁷⁸ So general words in one part may be controlled and restrained by particular words in another, taken as expressing the same intention with more precision.⁷⁹ The true meaning of any clause or provision is that which best accords with the subject and general purpose of the act and every other part. The word "notice" was held to mean a written notice because certain provisions required it to be *served* or left in a particular manner.⁸⁰ Where general and particular words occur, having reference to the subject of the act or some feature of it, the intention is the guide as deduced from a consideration of all its parts and the system of which it forms a part. Subsidiary provisions are not always co-extensive with those which define or indicate its full purpose. In *Bank of United States v. McKenzie*,⁸¹ the question was whether corporations as plaintiffs were within the fourth section of the act of limitations of the state of Virginia; the proviso suspending its operation as to certain classes of persons in certain conditions being inapplicable; they were not liable to any of the disabilities which were enumerated in the twelfth section, not even that of being beyond seas. Section 4 was held applicable, and Marshall, C. J., said, speaking of the words of section 4: "They do not take into view the character of the plaintiff but of the action. In construing this section it is entirely unimportant by whom the suit is brought. The action is clearly barred by the

10 Md. 268; *Beal v. Harwood*, 2 Har. & J. 167, 3 Am. Dec. 532; *Holl v. Deshler*, 71 Pa. St. 299; *Rogers v. Rogers*, 3 Wend. 503, 526; *Learned v. Corley*, 43 Miss. 687; *Reynolds v. Holland*, 35 Ark. 56.

⁷⁸ *Id.*

⁷⁹ *Simonds v. Powers*, 28 Vt. 354; *Long v. Culp*, 14 Kan. 412; *Electro M. etc. v. Van Auken*, 9 Colo. 204; *Covington v. McNickle*, 18 B. Mon. 262; *Maple Lake v. Wright Co.*, 12 Minn. 403; *Rex v. Midland Ry. Co.*,

L. R. 10 Q. B. 389; *Fredericks v. Howie*, 1 H. & C. 381; *Re Hermance*, 71 N. Y. 481; *Spackman's Case*, 1 Macn. & G. 170; *Foster v. Blount*, 18 Ala. 687; *Woodworth v. State*, 26 Ohio St. 196.

⁸⁰ *Moyle v. Jenkins*, 51 L. J. Q. B. 112; *Wilson v. Nightingale*, 8 Q. B. 1035. Compare *Cortis v. Kent Waterworks*, 7 B. & C. 314; *Williams v. McDonal*, 3 Pin. (Wis.) 331.

⁸¹ 2 Brock. 393.

length of time, whoever may be the plaintiff. The plain words of the statute are decisive. Nor does any reason or justice or policy exist which should take a corporation out of these words. The legislature could have no motive for limiting the time within which a suit should be brought by an individual which does not apply with exact force to a suit brought by a corporation. We find no words in the exception indicating an intention to make it co-extensive with the enacting clause, or to limit the general provision of the enacting clause to such general classes of persons as may comprehend individuals for whom justice would require the saving of rights which are found in the twelfth section. An exception is not co-extensive with the provision from which it forms the exception; and if a corporation cannot be brought within any of the savings of the statute, the inference is not that the corporation is withdrawn from the enacting clause, but that the legislature did not think it a being whose right to sue required a prolongation beyond the legal time given for suitors generally." It is here intended only to illustrate the flexibility of words as they are treated for the purpose of harmonizing one part of an act with another and with its general purpose. Like considerations will require a statute to be construed as a whole with reference to the entire system of which it forms a part.⁸² The inquiry to ascertain the intention of an act with reference to other legislation, and, when dubious, to extraneous facts and the general canons of construction, are discussed further on.

§ 349 (220). Effect of total conflict between two parts of an act.—Where one part of an act is in conflict with another, and they cannot be brought into harmony by any rule of construction; where they are of equal scope, and there is a point-blank repugnancy, so that if one operates at all it will necessarily antagonize any effect of the other, what is the consequence? Both are void, by one neutralizing the other, on the ground that the legislature *uno flatu* have

⁸² *McDougald v. Dougherty*, 14 Ga. 674.

enacted a contradiction; or one, for being earlier or later in position, must be deemed to render the other nugatory, or repeal it. The decisions are to the effect that the provision which is latest in position repeals the other.⁸³ Being later

⁸³ *Packer v. Sunbury, etc.* R. R. Co., 19 Pa. St. 211; *Ryan v. State*, 5 Neb. 276, 282; *Gibbons v. Brittenum*, 56 Miss. 232; *Harrington v. Rochester*, 10 Wend. 547, 553; *Commercial Bank v. Chambers*, 8 Sm. & M. 9; *Brown v. County Commissioners*, 21 Pa. St. 37, 42; *Quick v. Whitewater Township*, 7 Ind. 570; *Albertson v. State*, 9 Neb. 429; *Sams v. King*, 18 Fla. 557; *Branagan v. Dulaney*, 8 Colo. 408; *Gee v. Thompson*, 11 La. Ann. 657; *Peet v. Nalle*, 30 id., Pt. II., 949; *Hamilton v. Buxton*, 6 Ark. 24; *Ex parte Thomas*, 113 Ala. 1, 21 So. 369; *Hand v. Stapleton*, 135 Ala. 156, 33 So. 689; *Van Horn v. State*, 46 Neb. 62, 64 N. W. 365; *Shaaber v. Reading*, 7 Pa. Co. Ct. 280; *Link v. Jones*, 15 Colo. App. 281, 62 Pac. 339; *Delk v. Zorn*, 48 S. C. 149, 26 S. E. 466; *Weaver v. Davidson County*, 104 Tenn. 315, 59 S. W. 1105; *ante*, § 268. *Farmers' Bank v. Hale*, 59 N. Y. 53, upon this subject, is an interesting case. In 1870 the legislature enacted a statute which was held by a majority of the court to be self-contradictory. The first section prescribed the rate of interest that banking associations, organized under the laws of the state, might contract for and take; and provided that the penalty for usury should be forfeiture of twice the amount of the interest paid, substantially re-enacting the regulations and penalties prescribed in the national bank act. The next

section is: "It is hereby declared that the true intent and meaning of this act is to place the banking associations, organized and doing business [under the laws of this state], on an equality, in the particulars in this act referred to, with the national banks organized under the act of congress. And all acts and parts of acts inconsistent with the provisions hereof are hereby repealed." In 1872 the court had held that the national bank act, in these particulars, did not operate in that state, and that the general laws of the state, prescribing a loss of the debt as a penalty for usury, applied to those banks. *First Nat. Bk. of Whitehall v. Lamb*, 50 N. Y. 95, 10 Am. Rep. 438. It was therefore held in the case under review that the second section declared an intent directly opposed to the express provisions of the first section. *Church, C. J.*, said: "When different constructions may be put upon an act, one of which will accomplish the purpose of the legislature and the other render it nugatory, the former should be adopted; but when the provisions of an act are such that to make it operative would violate the declared meaning of the legislature, courts should be astute in construing it inoperative." The second section was treated as in the nature of a proviso, and controlling the previous provisions.

in position, the prevailing provision is deemed a later expression of the legislative will. This rule and the reason for it have been criticised,⁸⁴ because all the provisions of an act being adopted at the same time, there is no priority in point of time on account of their relative positions in the statute. This is strictly true; but, in the reading of a bill, matter near the close may be presumed to receive the last consideration, and, if assented to, is a later conclusion. Slight circumstances preponderate when a question is at equipose. It receives some support from the analogous rule applicable in the construction of wills,⁸⁵ but it is not even as to that subject carried to its full logical extent; for if one fund is bequeathed severally to two persons, they will both take by equal shares.⁸⁶

¶ In *McCormick v. West Duluth*⁸⁷ the court says: "When the first clause of a section conforms to the obvious policy and intent of the legislature, it is not rendered inoperative by a later inconsistent clause which does not conform to this policy and intent. In such cases the later clause is nugatory and must be disregarded." Words prevail over figures in case of conflict, as in the expression "ninety thousand (50,000)." ⁸⁸ ¶

§ 350 (221). By a singular caprice of the law a saving clause totally repugnant to the purview is rejected, while a proviso directly repugnant to the main body of the act repeals the purview, as it is said to speak the last intention of the makers.⁸⁹ In the case of private writings other than wills, as deeds or other instruments *inter vivos*, the earlier repugnant part prevails,⁹⁰ and the same seems to be the rule

⁸⁴ Bish. W. L., §§ 63-65.

⁸⁵ 1 Redf. on Wills, 443, 451; 2 Par. on Cont. *513.

⁸⁶ *Ridout v. Pain*, 3 Atk. 493; *McGuire v. Evans*, 5 Ired. Eq. 269; *Jones' Appeal*, 3 Grant, 169.

⁸⁷ 47 Minn. 272, 50 N. W. 128.

⁸⁸ *Weaver v. Davidson County*, 104 Tenn. 315, 59 S. W. 1105.

⁸⁹ *Attorney-General v. Chelsea Water Works Co.*, Fitzgibbons, 195; *Rex v. Justices*, 2 B. & Ad. 818.

⁹⁰ 2 Par. on Cont. *513; *Co. Litt.* 112; *Furnivall v. Coombes*, 5 M. & G. 736.

in legislative grants.⁹¹ Analogies, therefore, fail to furnish any consistent rule, and that which is sanctioned by adjudications is perhaps wise, since some rule should exist for such rare cases; it is a practicable solution, and there is a spice of reasoning to support it.

Such a contradiction will not be recognized so as to give arbitrary repealing effect to a provision later in position where it is of dubious import, but only where the contradiction is clear and explicit.⁹² The rule may be reversed and effect given to the clause or provision standing first in the act when it is more in accord with the general purpose of the act, construed in the light and with the aid of all other statutes *in pari materia*.⁹³ "The true principle undoubtedly is that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso, taken and construed together, is to prevail. If the principal object of the act can be accomplished and stand under the restriction of the saving clause or proviso, the same is not to be held void for repugnancy."⁹⁴

§ 351 (222). **Provisos, exceptions and saving clauses.**—It has not been an unfrequent mode of legislation to frame an act with general language in the enacting clause, and to restrict its operation by a proviso. It is often found difficult to limit the language in the enacting clause so as to admit every exception or limitation designed to be introduced into the section in its finished state.⁹⁵ Provisos and exceptions are similar; intended to restrain the enacting clause; to except something which would otherwise be within it, or in some manner to modify it.⁹⁶ A proviso is

⁹¹ *Fore v. Williams*, 35 Miss. 533. See *Dugan v. Bridge Co.*, 27 Pa. St. 303; *Mason v. Boom Co.*, 3 Wall. Jr. 252, Fed. Cas. No. 9232; *Matter of Second Ave. Church*, 66 N. Y. 395.

⁹² *State v. Williams*, 8 Ind. 191; *Mason v. Boom Co.*, 3 Wall. Jr. 252, Fed. Cas. No. 9232.

⁹³ *Sams v. King*, 18 Fla. 557; *Kan.*

Pac. Ry. Co. v. Wyandotte, 16 Kan. 587; *Folmer's Appeal*, 87 Pa. St. 133; *Renner v. Bennett*, 21 Ohio St. 431. See *Savings Institution v. Makin*, 23 Me. 360.

⁹⁴ 1 Kent's Com. 463, note b.

⁹⁵ *Savings Institution v. Makin*, 23 Me. 360.

⁹⁶ *Wayman v. Southard*, 10

something engrafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of a general class, or to guard against misinterpretation.⁹⁷ The general intent will be controlled by the particular intent subsequently expressed.⁹⁸ Where a statute forbids the doing of an act except upon a condition precedent, as obtaining a license, and it is impossible to perform the condition, as if the act provides that no license shall be granted, the condition is valid and the prohibition absolute.⁹⁹ A proviso is so identified with the text of a statute which it qualifies that if such enacting part is repealed by a subsequent statute repugnant to it, the proviso will fall also.¹ The effect of an exception which is a part of the enacting clause and is of general application is simply to restrict it as to the matter excepted. It operates for this purpose co-extensively with the matter which precedes. Hence in actions based on the statute the pleadings must negative the exception.² An exception is strictly construed.³ Where a usury law ex-

Wheat, 1, 6 L. Ed. 253; *Pearce v. Bank of Mobile*, 33 Ala. 693; *Rawls v. Kennedy*, 23 id. 240; *Vorhees v. Bank of United States*, 10 Pet. 449, 9 L. Ed. 490; *Mullins v. Treasurer of Surrey*, L. R. 5 Q. B. Div. 170; *McRae v. Holcomb*, 46 Ark. 306; *Stowell v. Zouch*, 1 Plowd. 361; *Silvis v. Aultman*, 141 Ill. 632, 31 N. E. 11; *In re Day*, 181 Ill. 73, 54 N. E. 646; *Southern Bell Tel. & Tel. Co. v. D'Alemberte*, 39 Fla. 25, 21 So. 570; *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398; *Ex parte Robinson*, 28 Tex. Ct. App. 511, 13 S. W. 786; *Quackenbush v. United States*, 177 U. S. 20, 20 S. C. Rep. 530, 44 L. Ed. 654.

⁹⁷ *Savings Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80; *Minis v. United States*, 15 Pet. 445, 10 L. Ed. 791; *Bank for Savings v. The Col-*

lector, 3 Wall. 495; *Pott Dwar*, 118; *Boon v. Juliet*, 2 Ill. 258; *Deitch v. Staub*, 115 Fed. 309, 53 C. C. A. 137.

⁹⁸ *Ihmsen v. Monongahela Nav. Co.*, 32 Pa. St. 152; *State v. Goetze*, 22 Wis. 363; *Gregory's Case*, 6 Co. 19b; *Foster's Case*, 11 Co. 56b; *Rex v. Taunton St. James*, 9 B. & C. 831, 836; *Minis v. United States*, 15 Pet. 445, 10 L. Ed. 791.

⁹⁹ *State v. Douglass*, 5 Sneed, 608.

¹ *Church v. Stadler*, 16 Ind. 463.

² *Vavasour v. Ormrod*, 6 B. & C. 430; *People v. Berberich*, 11 How. Pr. 333; *Spieres v. Parker*, 1 T. R. 141; *Hoffman v. Peters*, 51 N. J. L. 244, 17 Atl. 113; *Blasdel v. State*, 5 Tex. App. 263; *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398.

³ *State v. Fernandez*, 39 La. Ann. 538, 2 So. 233.

cepted building and loan associations, it was held to mean domestic associations only.⁴ The exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the law-maker the thing excepted would be within the general words had not the exception been made.⁵ Consequently if the statute is amended by striking out the exception, the intent is clear to put the excepted thing within the operation of the general words.⁶ An exception is not universally so extensive as the provision which it qualifies, as to subject-matter, for its purpose may be, and usually is, to reduce the subject-matter by withdrawing a part from the operation of the general words, or to give them a qualified operation merely as to the matter of the exception.⁷ Where there is a prohibition, grant or regulation in general words, and a saving of particular things, there is a strong implication that what is excepted would have been within the purview if it had not been excepted; and thus the purview may be made more comprehensive than it would otherwise have been.⁸ Thus, if there be a grant of all trees on a piece of land, which, if nothing more had been said, would only have embraced forest trees, but there is an exception of apple trees, other fruit trees, as peach and pear trees, will pass.⁹ But it is a matter of common experience that savings and exceptions are often introduced from abundant and even excessive caution. And it would sometimes pervert the intention of the author of the writing, if every other thing of the same general tenor as that excepted should be regarded as embraced in the general words. The rule, therefore, should be so defined as to avoid this perversion, and be limited to the

⁴ *National Mutual B. & L. Ass'n v. Pinkerton*, 79 Miss. 468, 30 So. 692.

⁵ *Commonwealth v. Summerville*, 204 Pa. St. 300, 54 Atl. 27.

⁶ *Arnold v. United States*, 147 U. S. 494, 13 S. C. Rep. 406, 37 L. Ed. 253.

⁷ *Bank of U. S. v. McKenzie*, 2 Brock. 393.

⁸ *Gibbons v. Ogden*, 9 Wheat. 191, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 438, 6 L. Ed. 678; *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396.

⁹ *Vin. Abr., Grants, H. 13, p. 61.*

cases where it is equivocal upon the general language whether a particular thing is embraced; then the exception of another thing of a similar kind will show that the first was intended to be included.¹⁰

§ 352 (223). The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it unless it clearly appears to have been intended to apply to some other matter.¹¹ It is to be construed in connection with the section of which it forms a part, and it is substantially an exception.¹² If it be a proviso to a particular section, it does not apply to others unless plainly intended.¹³ It should be construed with reference to the immediately preceding parts of the clause to which it is attached.¹⁴ In other words, the proviso will be so restricted in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect.¹⁵ It is not an arbitrary rule to be enforced at all events, but is based on the presumption that the meaning of the law-maker is thereby reached.¹⁶ "While

¹⁰ *Tinkham v. Tapscott*, 17 N. Y. 152.

¹¹ *Pearce v. Bank of Mobile*, 33 Ala. 693; *Bank for Savings v. The Collector*, 3 Wall. 495; *Savings Bank v. United States*, 19 Wall. 227; *Sutton v. People*, 145 Ill. 279, 34 N. E. 420; *Commonwealth v. Kelley*, 177 Mass. 221, 58 N. E. 691; *School District v. Coleman*, 39 Neb. 391, 55 N. W. 1068; *Leader Printing Co. v. Nichols*, 6 Okl. 302, 50 Pac. 1001; *Bull v. Kirk*, 37 S. C. 395, 16 S. E. 151.

¹² *Id.* Where a proviso is added to a section by amendment it will be applied to that section only unless the contrary intent is very plain. *De Graff v. Went*, 164 Ill. 485, 45 N. E. 1075.

¹³ *Callaway v. Harding*, 23 Gratt.

547; *Shewell Ave.*, 20 Pa. Co. Ct. 278.

¹⁴ *Partington, Ex parte*, 6 Q. B. 649, 653; *Spring v. Collector*, 78 Ill. 101; *Rex v. Newark-upon-Trent*, 3 B. & C. 71; *Lehigh Co. v. Meyer*, 102 Pa. St. 479; *Cushing v. Worrick*, 9 Gray, 382. See *United States v. Babbit*, 1 Black, 55, 17 L. Ed. 94; *Mechanics*, etc. *Bank's Appeal*, 31 Conn. 63; *Rogers v. Vass*, 6 Iowa, 405.

¹⁵ *United States v. Babbit*, 1 Black, 55, 17 L. Ed. 94.

¹⁶ *Friedman v. Sullivan*, 48 Ark. 213. Qualifying words at the end of a section may apply to the whole section and not merely to the last item or particular. *State v. St. Louis*, 174 Mo. 125, 73 S. W. 623; *King's Lake Drainage & Levee*

the position of a proviso in a statute has a great and sometimes a controlling influence upon the extent of its applicability, yet the inference from its position cannot override its plain general intent."¹⁷ If irrelevant to the enacting part and meaningless with reference thereto, or repugnant to the body of the act, it has been rejected.¹⁸ And it was remarked in argument in *Ihmsen v. Monongahela Navigation Co.*:¹⁹ "If it was not intended to restrain the general clause it was a nullity." This is taking a proviso very strictly. The intention of the law-maker, if plainly expressed, must have the force of law, though it may be in the form of a proviso; the intention expressed is paramount to form.²⁰ The form, however, is influential in the inquiry for the intent. The proper function of a proviso being to limit the language of the legislature, it will not be deemed intended from doubtful words to enlarge or extend the act or the provision on which it is engrafted.²¹ Where it follows and restricts an enacting clause generally in its scope and language, it is to be strictly construed and limited to objects fairly within its terms.²² To a statute allowing re-

Dist. v. Jamison, 176 Mo. 557, 75 S. W. 679.

¹⁷ *Deven v. York City*, 156 Pa. St. 359, 361, 27 Atl. 247.

¹⁸ *Penick v. High Shoals Mfg. Co.*, 113 Ga. 592, 38 S. E. 973; *Gilliland v. Citadel Square Baptist Church*, 33 S. C. 164, 11 S. E. 684; *Mullins v. Treasurer of Surrey*, L. R. 5 Q. B. Div. 170.

¹⁹ 32 Pa. St. 153.

²⁰ *State v. Eskridge*, 1 Swan, 413; *Baumont v. Irwin*, 2 Sneed, 291, 302; *Foster v. Pritchard*, 2 H. & N. 151; *Gibbons v. Ogden*, 9 Wheat. 191, 6 L. Ed. 23; *Farmers' Bank v. Hale*, 59 N. Y. 53; *Chapin v. Crusen*, 31 Wis. 209; *McDermut v. Lorillard*, 1 Edw. Ch. 273, 276; *State v. Harkness*, 1 Brev. 276;

Ayers v. Knox, 7 Mass. 306; *State v. King*, 44 Mo. 283; *Smith v. People*, 47 N. Y. 330; *Castner v. Walrod*, 83 Ill. 171, 179; *Carroll v. State*, 58 Ala. 396; *Commissioners v. Keith*, 2 Pa. St. 218; *Brace v. Solner*, 1 Alaska, 361; *Merwin v. Board of Com'rs*, 29 Colo. 169, 67 Pac. 285; *Chesapeake & P. Tel. Co. v. Manning*, 186 U. S. 238, 22 S. C. Rep. 881, 46 L. Ed. 1144; *State v. Browne*, 56 Minn. 269, 57 N. W. 659; *Bryan v. Board of Education*, 90 Ky. 322, 13 S. W. 276.

²¹ *Re Webb*, 24 How. Pr. 247.

²² *Bragg v. Clark*, 50 Ala. 363; *Epps v. Epps*, 17 Ill. App. 196; *Roberts v. Yarbboro*, 41 Tex. 449; *Willingham v. Smith*, 48 Ga. 580; *Blood v. Fairbanks*, 50 Cal. 420; *Butts v.*

ceivers of public moneys one per cent. on the money received, as compensation for clerk hire, receiving, safe keeping and transmitting such money, was added this proviso: "that the whole amount which any receiver of public moneys shall receive under the provisions of this act shall not exceed, for any one year, the sum of \$3,000." Applying a strict construction, it was held that this proviso limited the amount which each individual receiver was annually entitled to, and not the amount payable annually to the incumbents of the office, whether one or more. Story, J., said he was led to the general rule of law which has always prevailed and become consecrated as almost a maxim in the interpretation of statutes, that "when the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is strictly construed, and takes no case out of the enacting clause which does not fall fully within its terms." It should be within its letter and purpose.²³ The general law of Illinois making exemption of certain amounts of personal property from execution in favor of debtors was qualified by a provision that "no personal property shall be exempted . . . when the debt or judgment is for the wages of any laborer or servant." The court said "it would seem that the same policy which dictates a liberal construction of the statute in furtherance of its general beneficial purpose would necessitate a restricted construction of an exception by which its operation is limited and abridged;" but, independent of that consideration, the court held that provisos should be strictly construed, and accordingly it should be confined to those popularly known as laborers and servants, and did not include bookkeepers, managers and other like employees, engaged for skill and knowledge.²⁴ The erection of certain dams being

Railroad Co., 63 Miss. 462; *McRae v. Holcomb*, 46 Ark. 306; *Looker v. Davis*, 47 Mo. 140; *Mayor, etc. v. Magruder*, 34 Md. 381; *Southgate v. Goldthwaite*, 1 Bailey, 367; *Clark's Appeal*, 58 Conn. 207, 20

Atl. 456; *Covington v. Frank*, 77 Miss. 606, 27 So. 1000.

²³ *United States v. Dickson*, 15 Pet. 141, 10 L. Ed. 689.

²⁴ *Epps v. Epps*, 17 Ill. App. 196.

authorized, the act provided for compensation for any damages, direct or consequential, which might be occasioned to private property by the dams. A more specific provision in the same section was that the company authorized to maintain the dams should be liable for all consequential damages resulting to the owner or owners of real property situate upon either side of the improvement. The court remarked that "there was no necessity for a proviso unless to restrain terms so general as to embrace injuries to every species of property, wherever situated, that might sustain damages in consequence of the dams."²⁵

An act authorized the trustees of a cemetery to accept a conveyance of or to purchase lands for cemetery purposes, and, if they could not procure the same by contract, then to appropriate lands therefor; "but no lands shall be so appropriated on which is any house, barn, etc., nor shall any land be so appropriated within two hundred yards of a dwelling-house." It was held that the latter limitation applied as well to donations and purchases as to condemnations.²⁶ An act of congress appropriated a sum of money to pay the amount due mail contractors for the years 1859, 1860 and 1861 and prior to the war, with a proviso "that any such claims which have been paid by the Confederate States government shall not again be paid." It was held that the proviso qualified the enacting clause as though it read "to pay claims (of the kind described), not previously paid by the Confederate government," and that the burden was on the claimant to negative such payment.²⁷ A usury law provided that "none of the provisions of this act shall apply to any building and loan association incorporated under the provisions of any law of this state." At the time this was passed such associations could only loan to members. A later amendment permitted them to loan to outside parties

²⁵ *Ihmsen v. Monongahela Nav. Co.*, 32 Pa. St. 153.

²⁷ *Selma, R. & D. R. R. Co. v. United States*, 139 U. S. 560, 11 S.

²⁶ *Henry v. Trustees*, 48 Ohio St. C. Rep. 638, 35 L. Ed. 266, 671, 30 N. E. 1122.

any money which had been idle for thirty days. It was held that the exception in the usury law did not apply to loans of the latter sort.²⁸ Section 1 of a city charter gave the city the exclusive right to license the sale of liquor therein and required the license fee to be not less than \$500 nor more than \$1,000. Section 2 related to the exclusion of territory from the corporate limits and contained a proviso that one-third of the money collected from licenses should be paid into the county treasury. It was held that the proviso qualified section one and not section two.²⁹

§ 353 (224). The adjudications are instructive upon the exceptions to general statutes, extensively adopted, abolishing objections to the competency of witnesses. Where the general affirmative provision admits a witness, he can only be excluded where he is plainly included in the terms of the exception.³⁰ The objection of being a party or interested being removed, an exception excluding a party in actions by or against the executor or administrator of the opposite party will not apply to a suit by a surviving partner.³¹

²⁸ Vermont L. & S. Co. v. Whitehead, 2 N. D. 82, 49 N. W. 318.

²⁹ Brown County v. Aberdeen, 4 Dak. 402, 31 N. W. 735.

³⁰ Roberts v. Yarboro, 41 Tex. 449; Bragg v. Clark, 50 Ala. 363; Blood v. Fairbanks, 50 Cal. 420; McRae v. Holcomb, 46 Ark. 306; Looker v. Davis, 47 Mo. 140; Covington v. Frank, 77 Miss. 606, 27 So. 1000.

³¹ Bragg v. Clark, 50 Ala. 363; Roberts v. Yarboro, 41 Tex. 449; Bird v. Jones, 37 Ark. 195; Nolen v. Harden, 43 id. 307, 51 Am. Rep. 563; Wassell v. Armstrong, 35 Ark. 247. In Potter v. National Bank, 102 U. S. 163, 26 L. Ed. 111, Harlan, J., referring to section 858 of the Revised Statutes of the United States, said: "The first clause of that section shows that there was

in the mind of congress two classes of witnesses,—those who were parties to the issue, that is, parties to the record; and those interested in the issue to be tried, that is, those who, although not parties to the record, held such relations to the issue that they would lose or gain by the direct legal operation and effect of the judgment. A witness may be interested in the issue without being a party thereto—a distinction which seems to have been recognized in all the statutes to which reference has been made. But whether a party to or only interested in the issue, the witness is not excluded in the courts of the United States upon either ground, except that in actions in which the judgment may be rendered for or

§ 354 (225).³² A saving clause is, like a proviso, an exemption of a special thing out of the general things mentioned in the statute.³³ Its name implies such exemption to preserve from loss or destruction, and such is its use. It is generally employed to restrict repealing acts; to continue repealed acts in force as to existing powers, inchoate rights, penalties incurred, and pending proceedings, depending on the repealed statute.³⁴ An absolute repeal puts an end to such rights, powers and proceedings, and discharges such penalties.³⁵ To preserve them to any extent or for any purpose requires a special provision in the repealing act or existing statute having a saving effect. When such saving is included in the repealing statute it usually follows the repealing clause. The same reasons which exist for a strict construction of a proviso apply to a saving clause where there is an express repeal, and the saving clause is intended to restrict it. The special intent in the saving clause prevails over the general intent in the repeal; but the repug-

against an executor, administrator or guardian, no party to the action can testify against the other as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify by the court. The proviso of section 858 excludes only one of the classes described in the first clause,—those who are technically parties to the issue to be tried,—and we are not at liberty to suppose that congress intended the word ‘party,’ as used in that proviso, to include both those who, according to the established rules of pleading and evidence, are parties to the issue, and those who, not being parties, have an interest in the result of that issue.”

³² See generally on saving clauses, *ante*, § 287.

³³ Dwar. Stat. (2d ed.) 513.

³⁴ *Commonwealth v. Marshall*, 11 Pick. 350, 22 Am. Dec. 377; *Taylor v. State*, 7 Blackf. 93; *The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520; *Governor v. Howard*, 1 Murphy (N. C.), 465; *Commonwealth v. Kimball*, 21 Pick. 373; *Smith v. Banker*, 3 How. Pr. 142; *United States v. Helen*, 6 Cranch, 203, 3 L. Ed. 199; *People v. Gill*, 7 Cal. 356; *Commonwealth v. Bennett*, 108 Mass. 30; *Rex v. Justices*, 3 Burr. 1456; *Cochran v. Taylor*, 13 Ohio St. 382; *United States v. Kohnstamm*, 5 Blatchf. 222, Fed. Cas. No. 15,542; *Commonwealth v. Edwards*, 4 Gray, 1; *Files v. Fuller*, 44 Ark. 273; *Gilleland v. Schuyler*, 9 Kan. 569; *Beatty v. People*, 6 Colo. 538; *Harris v. Townshend*, 56 Vt. 716.

³⁵ *Ante*, §§ 282-286; and see *Bish. W. L.*, §§ 163, 168, 176, 177, 180.

nance will be reduced to a minimum in civil cases by construction of the former. The saving clause, however, is to have a reasonable construction to carry out the just and obvious purpose of the law-maker.³⁶ In an act repealing a temporary statute, a saving will only restrict the repeal so that persons who had offended against the act repealed can be prosecuted, convicted and punished as though there were no repeal. The mere saving does not create any power to punish, but only to preserve that which before existed.³⁷ A territorial act of 1839 in Iowa defined the crime of murder and prescribed the penalty. An act of 1843 repealed that of 1839, with a proviso that any person who had committed any crime punishable by it should be prosecuted and punished according to it, the same as if the repealing act had not been passed. The code of 1851 repealed all prior acts with the saving that crimes committed under any act repealed by it should not be affected by it. It was held that there was thereafter no law in force for punishing the offense of murder committed in 1840; that the code of 1851 only repealed the act of 1843, and did not repeal the act of 1839, for it had been repealed before; hence the saving in the code authorized no punishment for crimes committed against the act of 1839.³⁸

³⁶ *Toutill v. Douglas*, 33 L. J. Q. B. 66; *Linton v. Blakeney Joint Co-op. Society*, 3 H. & C. 853; *State v. Douglass*, 33 N. J. L. 363; *State v. Kelley*, 34 N. J. L. 75; *McGavisk v. State*, id. 509; *State v. Trenton*, 38 id. 64; *Commonwealth v. Pointer*, 5 Bush, 301; *Titcomb v. Insurance Co.*, 8 Mass. 328; *Isham v. Bennington Iron Co.*, 19 Vt. 230.

³⁷ *The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520.

³⁸ *Jones v. State*, 1 Iowa, 395. *Wright, C. J.*, thus expressed his dissent: "I admit that but for the saving clause contained in section

48 of the act of 1843, there would have remained no power to punish for this offense. The provision there made as to past offenses, however, I think, was substantially to that extent a re-enactment of the law of 1839. Thus, up to the adoption of the code, it is conceded that this offense could have been punished. I ask by what authority, and why? Clearly, because it was in violation of the law of 1839, which, as to past offenses, was expressly continued in force. For such offenses it was just as much the law of the land as was the law of 1843 for all sub-

In *Downs v. The Town of Huntington*,³⁹ the court said it would give a saving clause a very liberal construction to save a meritorious verdict which depended on a statute, and had not been reported when the repeal of the statute took effect. "A suit or proceeding" in a saving clause has been held to include an execution, because it is the final step in a suit.⁴⁰ An appropriation by a city council to meet the current expenses of the city was held to be a "proceeding" within the saving of a subsequent amendment of the charter, taking effect before the appropriation was expended, fixing a limit transcended by that appropriation.⁴¹ But in *Gordon v. The State*,⁴² the court, in expounding the general provision that "the repeal of a statute does not . . . affect any . . . *proceeding* commenced under and by virtue of the statute repealed," held that the word *proceeding* is a technical word; that therefore the holding of an election for permanently locating a county seat was not a proceeding within that provision. A statute authorized a release to the widow by the state of lands escheated from the deceased husband in consequence of his death without heirs capable of inheriting. A saving clause provided that nothing therein contained "shall affect any right which any other person may lawfully have to said property." One having no lawful right thereto could not invoke the aid of that provision to protect a possession wrongfully acquired.⁴³ The provision in a general repealing act that "no offense committed or penalty incurred previous to the time when any statutory provision shall be repealed shall

sequent offenses. Our courts, in the administration of it, and in punishing offenses committed thereunder, must necessarily have so treated it. . . . The power to prosecute, convict and punish offenders against the act repealed remains as perfect as if the repealing act had never been passed. There was no power to punish cre-

ated by the repealing act of 1843, but an express preservation of a power that before existed."

³⁹ 35 Conn. 588.

⁴⁰ *Dobbins v. First Nat. Bank*, 112 Ill. 553.

⁴¹ *Beatty v. People*, 6 Colo. 538.

⁴² 4 Kan. 489.

⁴³ *White v. White*, 2 Met. (Ky.) 185.

be affected by such repeal," was held to have reference solely to the laws repealed by the act, and to have no reference to future legislation.⁴⁴

§ 355 (226). The legislature has the power to pass a general saving statute which shall have the force and effect to save rights and remedies, except where the repealing statute itself shows that it was not the intention of the legislature that such rights and remedies should be saved.⁴⁵ Though one legislature cannot bind future legislatures, and each can make its laws prevail against any that exist, and its intention in that regard will be law,⁴⁶ yet, as all legislatures are presumed to proceed with a knowledge of existing laws, they may properly be deemed to legislate with general provisions of such a nature in view. When a repeal is enacted accompanied by no provision specially for existing rights which would be affected by it, it should be assumed that they are to have, and were intended to have, such protection as other statutes will give them. In such cases the repealing act is to be considered as limited in its effect and operation in the same manner and to the same extent as if it contained the saving provided by the general law.⁴⁷

⁴⁴ *Mongeon v. People*, 55 N. Y. 613.

⁴⁵ *Willetts v. Jeffries*, 5 Kan. 473; *Gilleland v. Schuyler*, 9 id. 569; *State v. Crawford*, 11 id. 32; *State v. Boyle*, 10 id. 113; *Grace v. Donovan*, 12 Minn. 580; *Wilson v. Herbert*, 41 N. J. L. 454, 32 Am. Rep. 243; *Brisbin v. Farmer*, 16 Minn. 215; *Sanders v. State*, 77 Ind. 227; *State v. Shaffer*, 21 Iowa, 486; *State v. Ross*, 49 Mo. 416; *Tipton v. Carrigan*, 10 Ill. App. 318; *Farmer v. People*, 77 Ill. 322.

⁴⁶ *Townsend v. Little*, 109 U. S. 504, 3 S. C. Rep. 357, 27 L. Ed. 1012.

⁴⁷ *Lakeman v. Moore*, 32 N. H. 410, 413. In *Files v. Fuller*, 44 Ark. 273, the court thus remark upon such a general provision: "This statute

has very little importance save in hermeneutics, and has been rarely invoked; for no legislature has power to prescribe to the courts rules of interpretation, or to fix for future legislatures any limits of power as to the effect of their action. Any subsequent legislature might make its repealing action operate in pending suits as effectually as if no such statute existed, and the courts are quite free to consider what the subsequent legislature did in fact intend, or had power to do. Still it has kept its place on the statute books, and it is persuasive at least that subsequent legislatures meant to keep in harmony with it, and in their legisla-

Thus, where a general provision existed that the repeal of an act should not affect "a right accruing, accrued, acquired or established," the subsequent repeal of an act allowing damages for injuries on the highway did not affect an existing cause of action.⁴³ Such a saving has reference to rights, not to procedure. Forms and proceedings are not contemplated further than they may be necessary to the preservation of rights.⁴⁹

§ 356 (227). In penal acts provisos or exemptions in favor of the accused are liberally construed on the same considerations that penal laws are strictly construed. As stated by Mr. Bishop, the doctrine is: "That in favor of the accused person criminal statutes may be either, according to the form of the provision, contracted or expanded by interpretation in their meanings, so as to exempt from punishment those who are not within their spirit and purpose, while at the same time . . . they can never be expanded against the accused so as to bring within their penalties any person who is not within their letter."⁵⁰ A statute creating an offense was repealed with this saving clause: that nothing contained in the repealing act "shall affect any prosecution now pending or which may be hereafter commenced for any public offense heretofore committed," etc. Prior to the repeal a prisoner had been convicted under the statute and sentenced to be executed, but the execution did not take place at the time appointed. In such cases, by the general law, the convict might be brought before the court at any subsequent time to be resentenced, and then before resentencing the court is to make inquiry whether any legal reason exists against it. It was held that a repeal of the statute defining the offense was a legal reason, and not within the saving.⁵¹ Some additional cases bearing upon the

tion supposed it would go without saying, that, when a repeal was made, all rights in suits pending under the old statute would be preserved."

⁴³ *Harris v. Townshend*, 56 Vt. 716.

⁴⁹ *Brotherton v. Brotherton*, 41 Iowa, 112.

⁵⁰ Bish. W. L., § 230.

⁵¹ *Aaron v. State*, 40 Ala. 307.

subject of saving in penal statutes are collected in a note below.⁵²

§ 357 (228). The effect of a total conflict between different parts of the same act has been discussed.⁵³ Apparently this rule applies to a proviso:⁵⁴ but it has been held not to apply to a saving clause.⁵⁵ Chancellor Kent says the reason of the distinction is not very apparent, and that it is difficult to see why the act should be destroyed by the one and not by the other.⁵⁶ Text-writers must take the law as they find it; so must the courts; but where an unmeaning distinction has found its way into the law for reasons which may have existed and have ceased, then the distinction ought to cease. *Cessante ratione legis, cessat et ipsa lex*. It is obviously to be the aim in the construction of the purview and saving clause not to frustrate and destroy either but to give them severally effect.⁵⁷

§ 358 (229). Interpretation clauses.—The legislature cannot authoritatively declare what the law is or has been; that is a judicial function and appertains to the courts.⁵⁸

⁵² *Sanders v. State*, 77 Ind. 227; *People v. Gill*, 7 Cal. 356; *Reg. v. Smith*, 1 L. & C. 181; *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119; *Heward v. State*, 13 Sm. & M. 261; *Dull v. People*, 4 Denio, 91; *Sneed v. Commonwealth*, 6 Dana, 338.

⁵³ *Ante*, § 349.

⁵⁴ *Townsend v. Brown*, 24 N. J. L. 80; 5 Hill, 225, note *a*; *White v. Railroad Co.*, 7 Heisk. 518; *Attorney-General v. The Chelsea Waterworks*, Fitzgib. 195. See *Jackson v. Moye*, 33 Ga. 296.

⁵⁵ *Walsingham's Case*, 2 Plowd. 565; *Wood's Case*, 1 Co. 40*a*, 47*a*; 1 Kent, Com. 462; *Mitford v. Elliott*, 8 Taunt. 13, 18.

⁵⁶ 1 Kent, Com. 463; *Bish. W. L.*, § 65.

⁵⁷ *Scott v. State*, 22 Ark. 369.

⁵⁸ *Ogden v. Blackledge*, 2 Cranch, 272, 2 L. Ed. 276; *Duncan v. State*, 7 Humph. 148; *Gough v. Pratt*, 9 Md. 526; *Ashley's Case*, 4 Pick. 23; *Watson v. Hoge*, 7 Yerg. 344; *Wayman v. Southard*, 10 Wheat. 1, 16 L. Ed. 253; *Governor v. Porter*, 5 Humph. 165; *Bingham v. Supervisors*, 8 Minn. 441; *Tilford v. Ramsey*, 43 Mo. 410; *People v. Supervisors*, 16 N. Y. 431; *Dash v. Van Kleeck*, 7 John. 477; *Young v. Beardsley*, 11 Paige, 93; *Jackson v. Phelps*, 3 Caines, 62; *Jones v. Wootten*, 1 Harr. (Del.) 77; *Field v. People*, 2 Scam. 79; *Cotton v. Brien*, 6 Rob. (La.) 115; *Olin v. Denver & R. G. R. Co.*, 25 Colo. 177, 53 Pac. 454; *Kern v. Supreme Council*, 167 Mo. 471, 67 S. W. 252; *Common-*

The legislature has exclusively the power to make laws, and thus declare what the law shall be.⁵⁹ A legislative construction of a statute is entitled to consideration, and will often have much weight.⁶⁰ In cases of doubt and uncertainty the solemn declaration of the legislative branch of the government, or practical construction by the executive department, gives a certain sanction, and will be influential with the courts.⁶¹ So the meaning of particular words in a recent statute will have weight; and their meaning may be inferred from earlier statutes in which the same words or language has been used, where the intent was more obvious or had been judicially established. The words of a statute, if of common use, are to be taken in their natural, plain, obvious and ordinary signification; but if a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended.⁶² Where the law-maker declares its own intention in the enactment of a particular law, or defines the sense of the words it employs in a statute, it not only exercises its legislative power, but exercises it with a plausible aim; for it professes to furnish aid to a correct understanding of its intention, and thus to facilitate the primary judicial inquiry in the exposition of the law after it is finished, promulgated, and has gone into practical operation. The legislature in passing an act may declare its meaning and construction, and such

wealth v. Warrick, 172 Pa. St. 140, 33 Atl. 373; *Re Handley's Estate*, 15 Utah, 212, 49 Pac. 829, 62 Am. St. Rep. 926.

⁵⁹ *Id.*

⁶⁰ *Philadelphia, etc. R. R. Co. v. Catawissa R. R. Co.*, 53 Pa. St. 20; *Hart v. Reynolds*, 1 Heisk. 208; *Dunlap v. Crawford*, 2 McCord Eq. 171; *Pike v. Megoun*, 44 Mo. 491. See *Aikin v. Western R. R. Co.*, 20 N. Y. 370; *Prentiss v. Danaher*, 20 Wis. 311; *State v. Oskins*, 28 Ind. 364; *Morgan v. Smith*, 4 Minn. 104.

⁶¹ *Mathews v. Shores*, 24 Ill. 27; *Union Ins. Co. v. Hoge*, 21 How. 35, 16 L. Ed. 61; *Solomon v. Commissioners*, 41 Ga. 157; *Wright v. Forrestal*, 65 Wis. 341, 348, 27 N. W. 52; *Gough v. Dorsey*, 27 Wis. 119; *Harrington v. Smith*, 28 id. 43; *State v. Timme*, 54 id. 318, 340, 11 N. W. 785; *Dean v. Borchsenius*, 30 Wis. 236; *post*, §§ 472, 486.

⁶² *Philadelphia, etc. R. R. Co. v. Catawissa R. R. Co.*, 53 Pa. St. 20. See *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396.

declaration will be binding on the courts.⁶³ An act declaring the meaning of a former act will be given effect prospectively.⁶⁴

§ 359 (230). Such provisions have been the subject of judicial comment and criticism. Lord Denman said: "We cannot refrain from expressing a serious doubt whether interpretation clauses will not rather embarrass the courts in their decision than afford that assistance which they contemplate. For the principles on which they are themselves to be interpreted may become matter of controversy; and the application of them to particular cases may give rise to endless doubts."⁶⁵

In *Williams v. Pritchard*,⁶⁶ Lord Kenyon said: "It cannot be contended that a subsequent act of parliament will not control the provisions of a prior statute, if it were intended to have that operation; but there are several cases in the books to show that when the intention of the legislature was apparent that such subsequent statute should not have such an operation there, even though the words of such statute, taken strictly and grammatically, would repeal a former act, the courts of law, judging for the benefit of the subject, have held that they ought not to have such a construction." Blackburn, J., in *Lindsay v. Cundy*,⁶⁷ said, parenthetically, that such clauses are a modern innovation, and frequently do a great deal of harm, because they give a non-natural sense to words which are afterwards used in a natural sense without noticing the distinction. In that

⁶³ *Mette v. Feltgen*, 148 Ill. 357, 36 N. E. 81; *Harvey v. Clarinda*, 111 Iowa, 528, 82 N. W. 994; *State v. Allison*, 155 Mo. 325, 56 S. W. 467; *State v. Plainfield Water Supply Co.*, 67 N. J. L. 357, 52 Atl. 230; *State v. Sneed*, 121 N. C. 614, 28 S. E. 365; *Commonwealth v. Curry*, 4 Pa. Supr. Ct. 356; *Lewis v. Glass*, 92 Tenn. 147, 20 S. W. 571; *Snyder v. Compton*, 87 Tex. 374, 28 S. W. 1061; *Sherman v. Langham*, 92

Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258, 260; *Griswold v. Nichols*, 111 Wis. 344, 87 N. W. 300; *Standard Cattle Co. v. Baird*, 8 Wyo. 144, 56 Pac. 598.

⁶⁴ *Erhard v. Clearfield Coal Co.*, 5 Pa. Dist. Ct. 11.

⁶⁵ *Regina v. Justices*, 7 Ad. & E. 480.

⁶⁶ 4 T. R. 2, 4.

⁶⁷ L. R. 1 Q. B. Div. 353.

case it was held not necessary to follow the statutory definition in every instance where the word occurred; that the statute could be satisfied by applying it to the word where there was nothing in the context to interpret it otherwise. This seems to be the effect of *Queen v. Pearce*,⁶⁸ where the court said of such a clause that it "should control where the words occur without being accompanied by any others tending to show their meaning; or to interpret words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain."⁶⁹

§ 360 (231). Statutory provisions are made in various forms to have effect specially in the interpretation of the law. They are distinguishable, and all are not construed and applied in the same manner. There is a manifest difference between definitive or interpretation clauses which are special, and those which are general; the former always having the most controlling effect where it is obvious that the legislature, without misconception of the effect of other legislation, have precisely in view the particular words or provisions to which the clause in question ostensibly applies. A legislative enactment based on a misconception of the

⁶⁸ L. R. 5 Q. B. Div. 386.

⁶⁹ In *Nutter v. Acerrington Local Board*, L. R. 4 Q. B. Div. 375, an act was in question in which it was provided that the word "street" should apply to and include any highway (not being a turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, etc. It was considered by Cotton, L. J., as enlarging and not restrictive; that it did not provide that it should not include a turnpike road. Bramwell, L. J., concurring in the view taken by Lord Justice Cotton, said: "There is one interpretation clause which says: 'Words importing the singular number

shall include the plural number, and that words importing the plural number shall include the singular number.' And, if that clause is to be taken in an exclusive sense, the words in the singular number would never mean the singular, and the words in the plural number would never mean the plural. It is thus, clearly, an additional interpretation. I read the words here [repeating the interpretation clause]. Then it is said that this is a street. And so it is. But it is also a turnpike road. The arguments upon the interpretation clause are equally good for either party."

law does not *per se* change the law so as to make it accord with the misconception.⁷⁰ A provision which is special by pointing to a particular act and declaring for what definite purpose it was enacted, or defining certain words or phrases, has the fullest effect. It is a part of the law and must be construed and applied accordingly, and the act will have a construction, and the words and phrases a meaning, in harmony with the defining provisions, even though otherwise they would have a different effect.⁷¹

On the other hand, general statutory definitions and rules of interpretation will apply when the statute in question is not plain, or, in other words, does not define and interpret itself.⁷² Where positive provisions are at variance with the definitions which it contains, the latter, it seems, must be considered as modified by the clear intent of the former on the principle that the special controls the general.⁷³ Such clauses are not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances.⁷⁴ Such definitions can, in the nature of things, have no effect except in the construction of the statutes themselves. The meaning of language depends on popular usage, and cannot, unless in a very slight degree, be affected by legislation.⁷⁵ It was enacted that in construing statutes the words "spirituous liquors" should be taken to include intoxicating liquors, and all mixed liquors any part of which is spirituous or in-

⁷⁰ Byrd v. State, 57 Miss. 243; Davis v. Delpit, 25 id. 445; Farmers' Bank v. Hale, 59 N. Y. 53.

⁷¹ Herold v. State, 21 Neb. 50, 31 N. W. 258; Smith v. State, 28 Ind. 321; State v. Adams, 51 N. H. 568; State v. Canterbury, 28 id. 195; Philadelphia, etc. R. R. Co. v. Catawissa R. R. Co., 53 Pa. St. 20; State v. S. & S. Orphan Home, 37 Ohio St. 275; Hankins v. People, 106 Ill. 628; Byrd v. State, 57 Miss. 243; Nelson v. Kerr, 2 T. & C. 299.

⁷² Queen v. Pearce, L. R. 5 Q. B. 386; Midland Ry. Co. v. Ambergate, etc. Ry. Co., 10 Hare, 359.

⁷³ Egerton v. Third Municipality, 1 La. Ann. 435; Farmers' Bank v. Hale, 59 N. Y. 53.

⁷⁴ Regina v. Justices, 7 Ad. & E. 480.

⁷⁵ State v. Canterbury, 28 N. H. 228; Neitzel v. Concordia, 14 Kan. 446.

toxicating. Under an indictment charging the selling of spirituous liquors, it was held error to admit proof of selling any liquor which was not such in fact, independently of the statutory definition; that the statute furnished a guide for the construction of the statute, not the indictment.⁷⁶

§ 361 (232). **Punctuation.**— When statutes were enacted without punctuation, it was a necessary conclusion that the punctuation subsequently inserted was no part of the law. That was often declared,⁷⁷ and has been declared since the practice has changed and punctuated bills are enacted.⁷⁸ So, when bills are not printed and furnished in their perfected form to members of the legislative body, and they are heard read, so that the ear and not the eye takes cognizance of them,⁷⁹ the punctuation, whether inserted or not, does not receive the attention of individual legislators. It may be assumed that the principal points are observed in the reading. The questions in court relating to punctuation or affecting construction have generally arisen on the presence, omission or misplacing of commas.

In *Ewing v. Burnet*⁸⁰ the court say: "Punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail; but the court will first take the instrument by the four corners in order to ascertain its true meaning. If that is apparent on judicially inspecting it, the punctuation will not be suffered to change it."⁸¹

⁷⁶ *State v. Adams*, 51 N. H. 568; *Jones v. Surprise*, 4 New Eng. Rep. 292; 64 N. H. 243.

⁷⁷ *Barrington on St.* (5th ed.) 439, note; *Dwarris on St.* (2d ed.) 601; 3 *Dane's Abr.* 558.

⁷⁸ *Hammock v. Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111; *Cushing v. Worrick*, 9 Gray, 382; *Albright v. Payne*, 43 Ohio St. 8, 1 N. E. 16. See *Commonwealth v. Shopp*, 1 Woodw. Dec. 123.

⁷⁹ *Bish. W. L.*, § 78; *Manger v. Board of Examiners*, 90 Md. 659, 45 Atl. 891.

⁸⁰ 11 Pet. 41, 9 L. Ed. 624.

⁸¹ *Albright v. Payne*, 43 Ohio St. 8; *Shriedley v. State*, 23 Ohio St. 130; *Hamilton v. Steamer R. B. Hamilton*, 16 id. 428; *Allen v. Russell*, 39 id. 336; *Morrill v. State*, 38 Wis. 434; *Commonwealth v. Shopp*, 1 Woodw. Dec. 123; *Caston v. Brock*, 14 S. C. 104.

Where effect may be given to all the words of a statute by transposing a comma, the alternative being the disregard of a material and significant word, or grossly straining and perverting it, the former course is to be adopted.⁸² Courts, in the construction of statutes, for the purpose of arriving at or maintaining the real meaning and intention of the law-maker, will disregard the punctuation,⁸³ or transpose the same,⁸⁴ or substitute one mark for another,⁸⁵ or repunctuate.⁸⁶ When the intent is uncertain, punctuation may afford some indication of the true intent and may be looked to as an aid,⁸⁷ and may even determine the construction,⁸⁸ but it is never allowed to have a controlling effect.⁸⁹ An act should be read as punctuated unless there is some reason to the contrary,⁹⁰ and this is especially true where a

⁸² *Commonwealth v. Shopp*, 1 Woodw. Dec. 123.

⁸³ *Noyes v. Marston*, 70 N. H. 7, 47 Atl. 592; *Howard Savings Institution v. Newark*, 63 N. J. L. 65, 42 Atl. 848; *Trustees v. White*, 48 Ohio St. 577, 29 N. E. 47; *Stiles v. Guthrie*, 3 Okl. 26, 41 Pac. 383; *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 17 S. C. Rep. 230, 41 L. Ed. 590.

⁸⁴ *Cook v. State*, 110 Ala. 40, 20 So. 360; *Matter of Brooklyn El. R. R. Co.*, 125 N. Y. 434, 26 N. E. 474; *State v. Deuel*, 63 Kan. 811, 66 Pac. 1037.

⁸⁵ *Stiles v. Guthrie*, 3 Okl. 26, 41 Pac. 383.

⁸⁶ *State v. Deuel*, 63 Kan. 811, 66 Pac. 1037; *State v. Pilgrim*, 17 Mont. 311, 42 Pac. 856; *Wade v. Lewis & Clark County*, 24 Mont. 335, 61 Pac. 879; *Trustees v. White*, 48 Ohio St. 577, 29 N. E. 47; *Baker v. Payne*, 22 Ore. 335, 29 Pac. 787; *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 17 S. C. Rep. 230, 41 L. Ed. 590; *Hamilton v. Str. R. B. Hamil-*

ton, 16 Ohio St. 428; *Martin v. Gleason*, 139 Mass. 183; *Hammock v. Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111; *United States v. Isham*, 17 Wall. 496, 21 L. Ed. 728; *Gyger's Estate*, 65 Pa. St. 311; *Randolph v. Bayne*, 44 Cal. 366; *Matter of Olmstead*, 17 Abb. New Cas. 320.

⁸⁷ *Commonwealth v. Kelly*, 177 Mass. 221, 58 N. E. 691; *Tyrrell v. New York*, 159 N. Y. 239, 53 N. E. 1111; *People v. Grant*, 70 Hun, 233, 24 N. Y. S. 776; *United States v. Three R. R. Cos.*, 1 Abb. (U. S.) 196.

⁸⁸ *Squires' Case*, 12 Abb. Pr. 38; *Cummings v. Akron Cement Co.*, 6 Blatchf. 509, Fed. Cas. No. 3473.

⁸⁹ *Cook v. State*, 110 Ala. 40, 20 So. 360; *Manger v. Board of Examiners*, 90 Md. 659, 45 Atl. 891; *Matter of Brooklyn El. R. R. Co.*, 125 N. Y. 434, 26 N. E. 474; *Archer v. Ellison*, 28 S. C. 238, 5 S. E. 713; *Jorgenson v. Superior*, 111 Wis. 561, 87 N. W. 565.

⁹⁰ *Trustees v. White*, 48 Ohio St. 577, 29 N. E. 47. In this case the

statute has been repeatedly re-enacted with the same punctuation.⁹¹ But as a rule punctuation is entitled to but little weight.⁹² The punctuation of the original act as passed by the legislature governs instead of the punctuation of the printed copy.⁹³

A statute read as follows: "The annual salaries and compensation of the members of the uniformed force of the department of street cleaning shall be fixed by the board of estimate and apportionment and shall not exceed the following:" Then followed eighteen clauses each separated by a semicolon, the first and last being as follows: "Of the general superintendent, three thousand dollars;" "Of the hostlers, seven hundred and twenty dollars each, and extra pay for work on Sundays." The claim was made that the words "and extra pay for work on Sundays," applied to all of the eighteen clauses. But the court held that the punctuation made it clear that the intent was to apply it to the last clause only. The court says: "The punctuation of this statute is of material aid in learning the intention of the legislature. While an act of parliament is enacted as read and the original rolls contain no marks of punctuation, a statute of this state is enacted as read and printed, so that the punctuation is a part of the act as passed, and appears

court says: "Now in construing a statute punctuation may be changed or disregarded. It will not, ordinarily, control unless other means fail. At the same time it is more or less to be relied upon in ascertaining the meaning intended. The presence of a comma, in one place or another, would not be allowed to subvert the obvious meaning of a sentence. On the other hand, it would not, without reason appearing for it, be disregarded. If that which appears to have been the general purpose of the legis-

lature is as well effectuated by reading the statute exactly as it has been caused to be printed, as it would be by changing it, even as to punctuation, no adequate motive is present moving to the change." This language is quoted and approved in *Slingluff v. Weaver*, 66 Ohio St. 621, 629, 64 N. E. 574.

⁹¹ *Commonwealth v. Kelly*, 177 Mass. 221, 58 N. E. 691.

⁹² *State v. Pilgrim*, 17 Mont. 311, 42 Pac. 856; *Wade v. Lewis & Clark County*, 24 Mont. 335, 61 Pac. 879.

⁹³ *McPhail v. Gerry*, 55 Vt. 174.

in the roll when filed with the secretary of state. The constitution provides that, except in case of necessity, formally certified by the governor, every bill must be printed 'in its final form' and placed upon the desks of members of the legislature at least three days prior to its passage, and upon the final reading no amendment is allowed.

"The punctuation, however, is subordinate to the text and is never allowed to control its plain meaning; but when the meaning is not plain, resort may be had to those marks, which for centuries have been in common use to divide writings into sentences, and sentences into paragraphs and clauses, in order to make the author's meaning clear. . . . The words relating to extra pay are not separated from the remaining words of the clause by a semicolon, as would be expected if they applied to the preceding clauses, but by a comma, which indicates an intention to limit their application to the clause in which they appear. This clear system of punctuation forbids, as we think, that the last words of the last clause, viz., 'and extra pay for work on Sundays,' should be read as a part of each of the other clauses except the first, which is obviously general in its application. The effect of the punctuation is the same as if the sentence was divided into eighteen independent sentences, with the first clause a part of each."⁹⁴

§ 362 (233). **Headings and marginal notes.**—In England marginal notes are not regarded as part of the law for the same reason that applies to the title and punctuation.⁹⁵ Added to a section in the copy printed by the queen's printer, they form no part of the statute itself, and are not binding as an explanation, or as a construction of the section.⁹⁶ Headings which were arranged in the bill and adopted with

⁹⁴ *Tyrrell v. New York*, 159 N. Y. 239, 242, 243, 53 N. E. 1111. See also *State v. Desforges*, 47 La. Ann. 1167, 17 So. 811. 521; *Venour v. Sellon*, L. R. 2 Ch. Div. 523; *Sutton v. Sutton*, L. R. 22 Ch. Div. 511.

⁹⁶ *Claydon v. Green*, *supra*.

⁹⁵ *Claydon v. Green*, L. R. 3 C. P.

it, it was held, might be referred to to determine the sense of any doubtful expression.⁹⁷ The latter is true in this country also.⁹⁸ Headings or titles inserted by compilers and not enacted by the legislature are not entitled to consideration.⁹⁹

⁹⁷ *Hammersmith, etc. Ry. Co. v. Brand*, L. R. 4 H. L. Cas. 171. ⁹⁸ *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197. And see *Logan v. Fidelity & Casualty Co.*, 146 Mo. 114, 47 N. E. 576; *Mackey v. Miller*, 126 S. W. 948.

⁹⁹ *People v. Gault*, 149 Ill. 39, 36 N. E. 576; *Mackey v. Miller*, 126 Fed. 161, — C. C. A. —, S. W. 948.

CHAPTER XIII.

INTERPRETATION AND CONSTRUCTION—GENERAL PRINCIPLES.

§ 363 (234). The intent of a statute is the law.—If a statute is valid it is to have effect according to the purpose and intent of the law-maker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent.¹ “The

¹ Phillips v. Pope's Heirs, 10 B. Mon. 172; Winslow v. Kimball, 25 Me. 493; Leoni v. Taylor, 20 Mich. 148; Mason v. Rogers, 4 Litt. 377; Stevens v. Fassett, 27 Me. 266; Reynolds v. Holland, 35 Ark. 56; Ogden v. Strong, 2 Paine, 584, Fed. Cas. No. 10,460; Milburn v. State, 1 Md. 17; Green v. State, 59 id. 123; Watson v. Hoge, 7 Yerg. 344; Canal Co. v. R. R. Co., 4 Gill & J. 1; Jackson v. Collins, 3 Cow. 89; Jackson v. Thurman, 6 John. 322; Crocker v. Crane, 21 Wend. 211, 34 Am. Dec. 228; Murray v. R. R. Co., 4 Keyes, 274; McInery v. Galveston, 58 Tex. 334; Atkins v. Disintegrating Co., 18 Wall. 272, 301, 21 L. Ed. 841; United States v. Rhodes, 1 Abb. (U. S.) at p. 36, Fed. Cas. No. 16,151; Eyston v. Studd, 2 Plowd. 465; Palms v. Shawano Co., 61 Wis. 211; People v. Eichelroth, 78 Cal. 141, 20 Pac. 364; San Francisco v. Mooney, 106 Cal. 586, 39 Pac. 852; Larimer Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111; Board of County Com'rs v. Hall, 9 Colo. App. 538, 49 Pac. 370; Hartford v. Hartford Theological Sem., 66 Conn. 475, 34 Atl. 483; Neary v. Philadelphia, etc. R. R. Co., 7 Houst. 419, 9 Atl. 405; State v. Jacksonville Terminal Co., 41 Fla. 363, 27 So. 221; Hopkins v. Florida Cent. etc. R. R. Co., 97 Ga. 107, 25 S. E. 452; Singer Mfg. Co. v. Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; Brewster v. Woolridge, 100 Ga. 305, 28 S. E. 43; Soby v. People, 134 Ill. 66, 25 N. E. 109; People v. English, 139 Ill. 622, 29 N. E. 678; Indiana, Ill. & Iowa R. R. Co. v. People, 154 Ill. 558, 39 N. E. 133; People v. Chicago, 152 Ill. 546, 38 N. E. 744; Canal Commissioners v. Sanitary District, 184 Ill. 597, 56 N. E. 953; Gage v. Chicago, 201 Ill. 93, 66 N. E. 374; Conrad v. Crowdsen, 75 Ill. App. 614; Harrison v. People, 92 Ill. App. 643; S. C. affirmed, 191 Ill. 257; Gilbert v. Morgan, 98 Ill. App. 281; Board of Com'rs v. Board of Com'rs, 128 Ind. 295, 27 N. E. 133; Lime City B. & L. Ass'n v. Black, 136 Ind. 544, 35 N. E. 829; United States v. Cohn, 2 Ind. Ter. 474, 52 S. W. 38; Landrum v. Flannigan, 60 Kan. 436, 56

intention of the legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of a statute when it leads

Pac. 753; *Commonwealth v. Barney*, 24 Ky. L. R. 2352, 74 S. W. 181; *Roland Park Co. v. State*, 80 Md. 448, 31 Atl. 298; *Commercial B. & L. Ass'n v. Mackenzie*, 85 Md. 132, 36 Atl. 754; *McCormick v. West Duluth*, 47 Minn. 272, 50 N. W. 128; *Fitzgerald v. Rees*, 67 Miss. 473, 7 So. 341; *State Board v. Mobile & O. R. R. Co.*, 72 Miss. 236, 16 So. 489; *Adams v. Yazoo & Miss. Val. R. R. Co.*, 75 Miss. 275, 22 So. 824; *Ott v. Lowery*, 78 Miss. 487, 29 So. 520; *Benson v. Chicago, etc. Ry. Co.*, 75 Minn. 163, 77 N. W. 798, 74 Am. St. Rep. 444; *State v. Walker*, 123 Mo. 56, 27 S. W. 363; *St. Louis & S. F. Ry. Co. v. Gracey*, 126 Mo. 472, 29 S. W. 579; *St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878; *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935; *State v. Wood*, 155 Mo. 425, 56 S. W. 464; *Power v. County Com'rs*, 7 Mont. 82, 16 Pac. 658; *Bullard v. Smith*, 28 Mont. 387; *State v. Baushausen*, 49 Neb. 558, 68 N. W. 950; *State v. Ross*, 20 Nev. 61, 14 Pac. 827; *Orvil v. Woodcliff*, 64 N. J. L. 236, 45 Atl. 686; *People v. Wemple*, 115 N. Y. 302, 22 N. E. 272; *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188, 12 Am. St. Rep. 819, 5 L. R. A. 340; *New York v. Manhattan Ry. Co.*, 143 N. Y. 1, 37 N. E. 494; *Spencer v. Myers*, 150 N. Y. 269, 44 N. E. 942, 55 Am. St. Rep. 675, 34 L. R. A. 175; *Manhattan Co. v. Kallenberg*, 165 N. Y. 1, 58 N. E. 790; *Head's Iron Foundry v. Sanders*, 77 Hun, 432, 28 N. Y. S. 808; *Jones v. Mail & Exp. Pub. Co.*, 80 Hun, 368, 30 N. Y. S. 335; *Henry v. Trustees*, 48 Ohio St. 671, 30 N. E. 1122; *Logan Natl. Gas & Fuel Co. v. Chillicothe*, 65 Ohio St. 186, 62 N. E. 122; *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N. E. 574; *State v. Simon*, 20 Ore. 365, 26 Pac. 170; *Greenfield Ave.*, 191 Pa. St. 290, 43 Atl. 290; *Lawrence County v. Meade County*, 6 S. D. 528, 62 N. W. 131; *Rose v. Wortham*, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609; *Storrie v. Houston City St. Ry. Co.*, 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716; *Edwards v. Morton*, 92 Tex. 152, 46 S. W. 792; *Ellis County v. Thompson*, 95 Tex. 22, 64 S. W. 927; *State v. O'Connor*, 96 Tex. 484, 73 S. W. 1031; *Croomer v. State*, 40 Tex. Crim. App. 672, 51 S. W. 924, 53 S. W. 882; *Sherwood v. Atlantic & D. Ry. Co.*, 94 Va. 291, 26 S. E. 943; *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243; *United States v. Chase*, 135 U. S. 255, 10 S. C. Rep. 756, 34 L. Ed. 117; *Wisconsin Central R. R. Co. v. Forsyth*, 159 U. S. 46, 15 S. C. Rep. 1020, 40 L. Ed. 71; *McKee v. United States*, 164 U. S. 287, 17 S. C. Rep. 92, 41 L. Ed. 437; *United States v. Goldenberg*, 168 U. S. 95, 18 S. C. Rep. 3, 42 L. Ed. 394; *Hawaii v. Mankichi*, 190 U. S. 190; *Pierce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280; *Rigney v. Plaster*, 88 Fed. 636; *Baggaley v. Pittsburg & L. S. Iron Co.*, 90 Fed.

away from the true intent and purpose of the legislature and to conclusions inconsistent with the general purpose of the act.”² “Intent is the spirit which gives life to a legislative enactment.”³ “In construing statutes the proper course is to start out and follow the true intent of the legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature.”⁴ A legislative intention to be efficient as law must be set forth in a statute; it is therefore a written law.⁵ How the intention is to be ascertained is only answered by the principles and rules of exposition. If a statute is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless.⁶ And where the intention of a statute has been ascertained by the application of the rules of interpretation, they have served their purpose, for all such rules are intended to reach that intent.⁷

636, 33 C. C. A. 202; *Tsoi Sim v. United States*, 116 Fed. 920, 54 C. C. A. 154; *Johnson v. Southern Pac. Co.*, 117 Fed. 462, 54 C. C. A. 681.

² *Edwards v. Morton*, 92 Tex. 152, 46 S. W. 792.

³ *St. Louis & S. F. Ry. Co. v. Gracey*, 126 Mo. 472, 480, 29 S. W. 579.

⁴ *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 7, 58 N. E. 790.

⁵ *Barker v. Esty*, 19 Vt. 131, 138; *Watson v. Hoge*, 7 Yerg. 344; *Swift v. Luce*, 27 Me. 285.

⁶ *United States v. Hartwell*, 6 Wall. 385, 395, 18 L. Ed. 830; *Ogden v. Strong*, 2 Paine, 584, Fed. Cas. No. 10,460; *United States v. Wiltberger*, 5 Wheat. 95, 5 L. Ed. 37; *Denton v. Reading*, 22 La. Ann. 607; *Fitzpatrick v. Gebhart*, 7 Kan. 35; *McCluskey v. Cromwell*, 11 N.

Y. 601; *People v. Schoonmaker*, 63 Barb. 44; *Pillow v. Bushnell*, 5 Barb. 156; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Sneed v. Commonwealth*, 6 Dana, 339; *Cearfoss v. State*, 42 Md. 406; *Beall v. Harwood*, 2 Har. & J. 167, 3 Am. Dec. 532; *Koch v. Bridges*, 54 Miss. 247; *Learned v. Corley*, 43 Miss. 689; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. Ed. 812; *Sussex Peerage*, 11 Cl. & Fin. 143; *Water Commissioners v. Brewster*, 42 N. J. L. 125; *Rudderow v. State*, 31 id. 512; *Vattel*, b. 2, sec. 363; *Rex v. Hodnett*, 1 T. R. 96.

⁷ *Parsons v. Circuit Judge*, 37 Mich. 287; *New Orleans, etc. R. R. Co. v. Hemphill*, 35 Miss. 17; *Ezekiel v. Dixon*, 3 Ga. 151; *Russell v. Farquhar*, 55 Tex. 359; *McCluskey v. Cromwell*, 11 N. Y. 601.

The sole authority of the legislature to make laws is the foundation of the principle that courts of justice are bound to give effect to its intention. When that is plain and palpable they must follow it implicitly. The rules of construction with which the books abound apply only where the words used are of doubtful import; they are only so many lights to assist the courts in arriving with more accuracy at the true interpretation of the intention. This is true whether the statute be public or private, general or special, remedial or penal.⁸ These rules are a part of the law of the land equally with the statutes themselves, and not much less important. The function of such interpretation unrestrained by settled rules would introduce great uncertainty, and would involve a power virtually legislative.⁹ When a doubt arises upon the construction of the words it is the duty of the court to remove the doubt by deciding it; and when the court has given its decision, the point can no longer be considered doubtful.¹⁰

§ 364 (235). To find out the intent is the object of all interpretation.—The intent of a statute being the law, it necessarily follows that the object of all interpretation is to find out that intent.¹¹ The court of errors and appeals of New Jersey says: "Now the fundamental principle is that the object of all judicial interpretation of a statute is to determine what intention is conveyed by the language used therein so far as it is necessary for determining whether the particular case or state of facts presented fall within it.

⁸ *State v. Stephenson*, 2 Bailey, 334.

⁹ *Spencer v. State*, 5 Ind. 45. See Whart. Com. on Am. Law, §§ 330, 604.

¹⁰ *Bell v. Holtby*, L. R. 15 Eq. 178.

¹¹ *Hogan v. Akin*, 181 Ill. 448, 58 N. E. 137; *Swan v. Mulhevin*, 67 Ill. App. 77; *Board of Com'rs v. Board of Com'rs*, 128 Ind. 295, 27 N. E. 133; *Commonwealth v. Barney*, 24 Ky. L. R. 2352, 74 S. W. 181; *Ben-*

son v. Chicago, etc. Ry. Co., 75 Minn. 163, 77 N. W. 798, 74 Am. St. Rep. 444; *Cate v. Martin*, 70 N. H. 135, 46 Atl. 54, 48 L. R. A. 613; *Orvil v. Woodcliff*, 64 N. J. L. 286, 45 Atl. 686; *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N. E. 574; *State v. Simon*, 20 Ore. 365, 26 Pac. 170; *Lesesne v. Yound*, 33 S. C. 543, 12 S. E. 414; *Dewey v. United States*, 178 U. S. 510, 20 S. C. Rep. 981, 44 L. Ed. 1170.

When the intention is expressed the question is one of verbal construction only, but if the language be not express and some intention must necessarily be imputed, then it must be determined by inference grounded on legal principles, one of which is that the legislature must have entertained some intention and the interpreter must determine what it was unless it be that the statute lacks the formal requisite needed in order to give it the effect of a law. It is the true sense of the form of words which are used which is to be discovered by the interpretation or construction of the statute, taking all its parts into consideration, and, if fairly possible, giving them all effect."¹²

It is the intent of the law that it is to be ascertained, and the courts do not substitute their views of what is just or expedient.¹³ Courts are not at liberty to speculate upon the intentions of the legislature where the words are clear, and to construe an act upon their own notions of what ought to have been enacted.¹⁴ The wisdom of a statute is not a judicial question;¹⁵ nor can courts correct what they may deem excesses or omissions in legislation, or relieve against the occasionally harsh operation of statutory provisions without danger of doing more mischief than good.¹⁶

§ 365 (236). Interpretation and construction compared. Dr. Lieber defines *interpretation* as "the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author

¹² *Orvil v. Woodcliff*, 64 N. J. L. 286, 288, 289, 45 Atl. 686.

¹³ *Hadden v. Collector*, 5 Wall. 107, 18 L. Ed. 518; *State v. Clarke*, 54 Mo. 17, 36; *Jewell v. Weed*, 18 Minn. 272; *Municipal Building Society v. Kent*, L. R. 9 App. Cas. 273; *Douglass v. Chosen Freeholders*, 38 N. J. L. 212, 216; *Fordyce v. Bridges*, 1 H. L. Cas. 1.

¹⁴ *York, etc. Ry. Co. v. The Queen*,

1 E. & B. 858, 864; *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N. E. 574.

¹⁵ *York, etc. Ry. Co. v. The Queen*, 1 E. & B. 858, 864; *Reithmiller v. People*, 44 Mich. 280, 6 N. W. 667; *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52.

¹⁶ *Bronson, J., in Waller v. Harris*, 20 Wend. 562, 32 Am. Dec. 590; *State v. Heman*, 70 Mo. 441.

intended to convey.”¹⁷ He uses this word in a sense distinct from *construction*.¹⁸ These words, however, are very generally used interchangeably and as practically synonymous. The literal interpretation of a statute is finding out its true sense according to Dr. Lieber’s definition — by making the statute its own expositor. If the true sense can thus be discovered, there is no resort to construction.¹⁹ The certainty of the law is next in importance to its justice. And if the legislature has expressed its intention in the law itself, with certainty, it is not admissible to depart from that intention on any extraneous consideration or theory of construction.²⁰

§ 366 (237). **Intent first to be sought in language of statute itself.**—“It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power, and seek for that intent in every legitimate way. But . . . first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation.”²¹ The statute itself furnishes the best means of its own exposition;

¹⁷ Hermeneutics, p. 11.

¹⁸ He says: “Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text. Conclusions which are in the spirit though not in the letter of the text.” Hermeneutics, 44. And again he says: “In the most general adaptation of the term, construction signifies the representing of an entire whole from given elements by just conclusions. Thus, it is said, a few actions may sometimes suffice to construe the whole character of a man.” Id. 49.

¹⁹ *Cearfoss v. State*, 42 Md. 403, 406.

²⁰ Id.; *Johnson v. Railroad Co.*, 49 N. Y. 455; *Alexander v. Worthington*, 5 Md. 471; *United States v. Ragsdale*, Hempst. 497, Fed. Cas. No. 16,113.

²¹ *McCluskey v. Cromwell*, 11 N. Y. 601; *Clark v. Mayor etc.*, 29 Md. 283; *People v. Schoonmaker*, 63 Barb. 44, 47; *Benton v. Wickwire*, 54 N. Y. 226, 228; *Bonds v. Greer*, 56 Miss. 710; *Schlegel v. Am. Beer, etc. Co.*, 12 Abb. New Cas. 280; S. C., 64 How. Pr. 196; *People v. Supervisors*, 13 Abb. New Cas. 421; *Fitzpatrick v. Gebhart*, 7 Kan. 35; For-

and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.²² Very strong expressions have been used by the courts to emphasize the principle that they are to derive their knowledge of the legislative intention from the words or language of the statute itself which the legislature has used to express it, if a knowledge of it can be so derived.²³

In *Alexander v. Worthington*,²⁴ the Maryland court of appeals have lucidly expressed this sound doctrine on the

dyce v. Bridges, 1 H. L. Cas. 1; *Logan v. Courtown*, 13 Beav. 22; *Schooner Pauline's Cargo v. United States*, 7 Cranch, 152, 3 L. Ed. 266; *Notley v. Buck*, 8 B. & C. 164; *Rex v. Poor Law Commissioner*, 6 A. & E. 17; *Att'y-Gen'l v. Sillem*, 2 H. & C. 508; *Eureka v. Diaz*, 89 Cal. 467, 26 Pac. 961; *Hopkins v. Florida Cent. etc. R. R. Co.*, 97 Ga. 107, 25 S. E. 452; *Landrum v. Flannigan*, 60 Kan. 436, 56 Pac. 753; *Talbott v. Fidelity & Casualty Co.*, 74 Md. 536, 22 Atl. 395; *Cove v. Nimocks*, 78 Minn. 249, 80 N. W. 1056; *Jay v. School District*, 24 Mont. 219, 61 Pac. 250; *Rodenbaugh v. Philadelphia Traction Co.*, 190 Pa. St. 358, 42 Atl. 953.

²² *Green v. Weller*, 32 Miss. 650. "A primary rule of construction is that the legislature must be assumed to have meant precisely what the words of the law, as commonly understood, import; and this may be said to be the fundamental and controlling rule of construction." *Lemonius v. Mayer*, 71 Miss. 514, 521, 14 So. 33.

²³ *Denn v. Reid*, 10 Pet. 524, 9 L. Ed. 519; *Watson v. Hoge*, 7 Yerg.

344; *McCluskey v. Cromwell*, 11 N. Y. 601; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224; *Bennett v. Worthington*, 24 Ark. 487; *Gardner v. Collins*, 2 Pet. 58, 93, 7 L. Ed. 347; *Bradford v. Treasurer, Peck (Tenn.)*, 425; *Warburton v. Loveland*, 2 Dow & Cl. 489; *Sturges v. Crowninshield*, 4 Wheat. 202, 4 L. Ed. 529; *Denton v. Reading*, 22 La. Ann. 607; *State v. Wiltz*, 11 La. Ann. 439; *Kinderley v. Jervis*, 25 L. J. Ch. 541; *New Orleans, etc. R. R. Co. v. Hemphill*, 35 Miss. 17; *Ezekiel v. Dixon*, 3 Ga. 152; *State v. Buckman*, 18 Fla. 267; *Hindmarsh v. Charlton*, 8 H. L. Cas. 166; *Jennings v. Love*, 24 Miss. 249; *Tynan v. Walker*, 35 Cal. 634; *Virginia City, etc. R. R. Co. v. Lyon County*, 6 Nev. 68; *Scaggs v. Baltimore, etc. R. R. Co.*, 10 Md. 268; *Trapnall, Ex parte*, 6 Ark. 9; *Countess of Rothes v. Kirkcaldy Water Works, L. R.* 7 App. Cas. 702; *Abbott v. Middleton*, 7 H. L. 68; *The Sussex Peerage*, 11 Cl. & Fin. 85, 143; *Myers v. Perigal*, 2 D. Mac. & G. 619.

²⁴ 5 Md. 485.

point under consideration: "The language of a statute is its most natural expositor; and where its language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations. The construction is to be on the entire statute; and where one part is susceptible indifferently of two constructions, and the language of another part is clear and definite, and is consistent with one of the two constructions of which the former part of the statute is susceptible, and is opposed to the other construction, then we are to adopt that construction which will render all clauses of the statute harmonious, rather than that other construction which will make one part contradictory to another. Where the letter of the statute is inconsistent with itself, we may eviscerate an intent by considering the mischief existing and the remedy proposed to be introduced. . . . We are not at liberty to imagine an intent and bind the letter of the act to that intent; much less can we indulge in the license of striking out and inserting, and remodeling, with the view of making the letter express an intent which the statute in its native form does not evidence. Every construction, therefore, is vicious which requires great changes in the letter of the statute, and, of the several constructions, that is to be preferred which introduces the most general and uniform remedy."

The supreme court of the United States says: "The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise

to have specifically provided for, justify any judicial addition to the language of the statute."²⁵

The legislature must be understood to mean what it has plainly expressed, and this excludes construction.²⁶ The legislative intent being plainly expressed, so that the act read by itself, or in connection with other statutes pertaining to the same subject, is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms.²⁷ Cases cannot be included or excluded merely because there is intrinsically no reason against it.²⁸ Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity.²⁹ If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage.³⁰ Courts have, then, no power to set it aside, or evade its operation by forced and unreasonable construction. If it has been passed

²⁵ *United States v. Goldenberg*, 168 U. S. 95, 102, 103, 18 S. C. Rep. 3, 42 L. Ed. 394.

²⁶ *Rex v. Banbury*, 1 A. & E. 143; *Case v. Wildridge*, 4 Ind. 51; *Johnson v. Railroad Co.*, 49 N. Y. 455, 462; *United States v. Fisher*, 2 Cranch, 358, 2 L. Ed. 304; *The Sussex Peerage*, 11 Cl. & Fin. 143; *Koch v. Bridges*, 45 Miss. 247; *United States v. Hartwell*, 6 Wall. 395, 18 L. Ed. 830; *State v. Buckman*, 18 Fla. 267; *Ogden v. Strong*, 2 Paine, 584, Fed. Cas. No. 10,460; *Denn v. Reid*, 10 Pet. 524, 9 L. Ed. 519.

²⁷ *Rosenplaenter v. Roessle*, 54 N. Y. 262; *Woodbury v. Berry*, 18 Ohio St. 456, 462; *Miller v. Salomons*, 7 Ex. 560; *Green v. Cheek*, 5

Ind. 105; *Douglass v. Chosen Freeholders*, 38 N. J. L. 214; *Story on Const.*, § 426.

²⁸ *Denn v. Reid*, 10 Pet. 524, 9 L. Ed. 519; *Pike v. Hoare*, 2 Eden, 184; *Ogden v. Strong*, 2 Paine, 584, Fed. Cas. No. 10,460.

²⁹ *Smith v. State*, 66 Md. 215, 7 Atl. 49; *Woodbury v. Berry*, 18 Ohio St. 456; *Bradbury v. Wagenhorst*, 54 Pa. St. 182; *St. Louis, etc. R. R. Co. v. Clark*, 53 Mo. 214; *Notley v. Buck*, 8 B. & C. 164.

³⁰ *Flint, etc. Co. v. Woodhull*, 25 Mich. 99, 12 Am. Rep. 233; *People v. Briggs*, 50 N. Y. 553; *Collin v. Knoblock*, 25 La. Ann. 263; *Jewell v. Weed*, 18 Minn. 272; *Lower Chatham*, In re, 35 N. J. L. 497.

improvidently, the responsibility is with the legislature and not with the courts.³¹ Whether the law be expressed in general or limited terms, the legislature should be held to mean what they have plainly expressed, and consequently no room is left for construction; but if, from a view of the whole law, or from other laws *in pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that, in fact, is the will of the legislature.³²

§ 367 (238). If intent plainly expressed it is to be followed without further inquiry.—“When the intention of the legislature is so apparent from the face of a statute that there can be no question as to the meaning, there is no room for construction.”³³ “It is not allowable to interpret what has no need of interpretation.”³⁴ To attempt to do so would be to exercise judicial functions.³⁵ “There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses.”³⁶ These views of eminent courts are supported by numerous cases.³⁷ When the meaning of a statute is clear, its consequences, if evil, can only be

³¹ Leonard v. Wiseman, 31 Md. 201; State v. Vicksburg, etc. R. R. Co., 51 Miss. 361; Rohrbacher v. City of Jackson, id. 735; Winter v. Jones, 10 Ga. 190; Douglass v. Chosen Freeholders, 38 N. J. L. 214; Ornamental Woodwork Co. v. Brown, 2 H. & C. 63; Mirehouse v. Rennell, 1 Cl. & Fin. 546; May v. Great W. Ry. Co., L. R. 7 Q. B. 377; Rex v. Poor Law Commissioners, 6 Ad. & E. 7.

³² United States v. Fisher, 2 Cr. 358, 2 L. Ed. 304; Farrell Foundry v. Dart, 26 Conn. 376, 382; Sneed v. Commonwealth, 6 Dana, 338; Abley v. Dale, 11 C. B. 378; Miller v. Salomons, 7 Ex. 475.

³³ People v. Sands, 102 Cal. 12, 16, 36 Pac. 404.

³⁴ Gilbert v. Dutruit, 91 Wis. 661, 665, 65 N. W. 511.

³⁵ McKay v. Fairhaven & W. R. Co., 75 Conn. 608, 54 Atl. 923.

³⁶ Swarts v. Siegel, 117 Fed. 13, 54 C. C. A. 399.

³⁷ Kelley v. Burke, 132 Ala. 235, 31 So. 512; Railway Co. v. B'Shears, 59 Ark. 237, 27 S. W. 2; Davis v. Hart, 123 Cal. 384, 55 Pac. 1060; Lee Bros. Furn. Co. v. Cram, 63 Conn. 433, 28 Atl. 540; Appeal of Drawbaugh, 3 App. Cas. (D. C.) 236; Powell v. Spackman, 7 Idaho, 692, 65 Pac. 503; Illinois Cent. R. R. Co. v. Chicago, 173 Ill. 471, 50 N. E. 1104;

avoided by a change of the law itself, to be effected by the legislature and not by judicial construction.³⁸ But an interpretation of a statute which must lead to consequences which are mischievous and absurd is inadmissible if the stat-

People v. Rose, 174 Ill. 310, 51 N. E. 246; People v. Atchison, etc. Ry. Co., 201 Ill. 365, 66 N. E. 232; Deatherage v. Rohrer, 78 Ill. App. 248; McGann v. People, 97 Ill. App. 587; Board of Election Com'rs v. State, 148 Ind. 675, 48 N. E. 226; Grimes v. N. W. Legion of Honor, 97 Iowa, 315, 66 N. W. 183; In re Shonkwiler's Assignment, 104 Iowa, 67, 73 N. W. 479; In re King's Estate, 105 Iowa, 320, 75 N. W. 187; State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 84 Am. St. Rep. 360, 51 L. R. A. 347; Robertson v. Robertson, 100 Ky. 696, 39 S. W. 244; Davis v. Randall, 97 Me. 36, 53 Atl. 835; Barker v. Hebbard, 81 Mich. 267, 45 N. W. 964; Minneapolis Co-op. Co. v. Williamson, 51 Minn. 53, 52 N. W. 986; Cone v. Nimocks, 78 Minn. 249, 80 N. W. 1056; Lemonius v. Mayer, 71 Miss. 514, 14 So. 33; Davenport v. Hannibal, 120 Mo. 150, 25 S. W. 364; Stevens v. St. Louis M. B. T. Ry. Co., 152 Mo. 212, 53 S. W. 1066; Butte Hardware Co. v. Sullivan, 7 Mont. 307, 16 Pac. 588; New York v. Manhattan Ry. Co., 143 N. Y. 1, 37 N. E. 494; McKechnie Brewing Co. v. Canandaigua, 15 App. Div. 139, 44 N. Y. S. 317; Randall v. Richmond & D. R. R. Co., 104 N. C. 410, 10 S. E. 691; Randall v. Richmond & D. R. R. Co., 107 N. C. 748, 12 S. E. 605, 11 L. R. A. 460; Choc-taw, O. & G. R. R. Co. v. Alexander, 7 Okl. 591, 54 Pac. 421; Rodenbaugh v. Philadelphia Traction Co., 190 Pa. St. 353, 42 Atl. 953; Wadasz v.

Arcade Real Est. Co., 206 Pa. St. 539; State v. Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; Scheibler v. Munding, 86 Tenn. 674, 9 S. W. 33; State v. Phoenix Ins. Co., 92 Tenn. 420, 21 S. W. 893; State v. Manson, 105 Tenn. 232, 58 S. W. 319; State v. Smith, 3 Tenn. Cas. 493; Galveston, H. & S. A. Ry. Co. v. State, 81 Tex. 572, 17 S. W. 67; Miles v. Wells, 22 Utah, 55, 61 Pac. 534; State v. Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243; State v. Scott, 36 W. Va. 704, 15 S. E. 405; Gilbert v. Dutruit, 91 Wis. 661, 65 N. W. 511; Rice v. Ashland County, 108 Wis. 189, 84 N. W. 189; First Nat. Bank v. Ludvegsen, 8 Wyo. 230, 50 Pac. 934, 80 Am. St. Rep. 928; Yerke v. United States, 173 U. S. 439, 19 S. C. Rep. 441, 43 L. Ed. 760; Hamilton v. Rathbone, 175 U. S. 414, 20 S. C. Rep. 155, 44 L. Ed. 319; Morgan v. Des Moines, 60 Fed. 208, 8 C. C. A. 569, 19 U. S. App. 593; Webber v. St. Paul City Ry. Co., 97 Fed. 140, 38 C. C. A. 79; Southern Ry. Co. v. Machinists' Local Union, 111 Fed. 49; Johnson v. Southern Pac. Co., 117 Fed. 462, 54 C. C. A. 681; Queen v. Hopkins, (1893) 1 Q. B. 621.
³⁸ Bosley v. Mattingly, 14 B. Mon. 89; United States v. Ragsdale, Hempst. 497, Fed. Cas. No. 16,113; Bartlett v. Morris, 9 Porter, 266; Att'y-Gen'l v. Sillem, 2 H. & C. 510; Kinderley v. Jervis, 25 L. J. Ch. 541; Arthur v. Morrison, 96 U. S. 108, 24 L. Ed. 744; Queen v. Hopkins, (1893) 1 Q. B. 621.

ute is susceptible of another interpretation by which such consequences can be avoided.³⁹ For this purpose all parts of a statute are to be read and compared. Still, when the words of a provision are plainly expressive of an intent not rendered dubious by the context, no interpretation can be permitted to thwart that intent; the interpretation must declare it, and it must be carried into effect as the sense of the law.⁴⁰

In the case of *Sturges v. Crowninshield*⁴¹ the court say: "Although the spirit of the instrument, especially of the constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation. Where words conflict with each other, where the different clauses of the instrument bear upon each other, and would be inconsistent unless the natural and common import of the words be varied, construction becomes necessary; and to depart from the obvious meaning of words is justifiable. Yet, in no case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded because we believe the framers of that instrument could not intend what they say. It must be one

³⁹ *Caledonian Ry. Co. v. North British Ry. Co.*, L. R. 6 App. Cas. 122; *State v. Wiltz*, 11 La. Ann. 439; *Ellis, Ex parte*, 11 Cal. 222; *Ryegate v. Wardsboro*, 30 Vt. 746; *Walton, Ex parte*, L. R. 17 Ch. Div. 746; *Gover's Case*, L. R. 1 Ch. Div. 198; *Wear River Commissioners v. Adamson*, L. R. 1 Q. B. Div. 549; *Vicar, etc. of St. Sepulchre's, Ex parte*, 33 L. J. Ch. 373; *Alvord v. Lent*, 23 Mich. 372.

⁴⁰ *Douglass v. Chosen Freeholders*, 38 N. J. L. 214; *Bradbury v. Wagenhorst*, 54 Pa. St. 182; *Howard Asso-*

ciation's Appeal, 70 id. 344; *Johnson v. R. R. Co.*, 49 N. Y. 455; *People v. Schoonmaker*, 63 Barb. 49; *United States v. Ragsdale, Hempst.* 497, Fed. Cas. No. 16,113; *United States v. Warner*, 4 McLean, 463, Fed. Cas. No. 16,643; *Farrell Foundry v. Dart*, 26 Conn. 376; *State v. Washoe Co.*, 6 Nev. 104; *Bartlett v. Morris*, 9 Port. 266; *Fitzpatrick v. Gebhart*, 7 Kan. 35; *Miller v. Salomons*, 7 Ex. 475; *Abley v. Dale*, 11 C. B. 378; *Gwynne v. Burnell*, 6 Bing. N. C. 559.

⁴¹ 4 Wheat. 202, 4 L. Ed. 529.

in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

One who contends that a section of an act must not be read literally must be able to show one of two things: either that there is some other section which cuts down or expands its meaning, or else that the section itself is repugnant to the general purview.⁴² The question for the courts is, what did the legislature really intend to direct; and this intention must be sought in the whole of the act, taken together, and other acts *in pari materia*. If the language be plain, unambiguous and uncontrollable by other parts of the act, or other acts or laws upon the same subject, the courts cannot give it a different meaning to subserve public policy or to maintain its constitutionality. The limited meaning of words will be disregarded when it is obvious from the act itself that the use of the word was a clerical error, and that the legislature intended it in a different sense from its common meaning.⁴³ Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity, of the result is out of place.⁴⁴ It is not the province of the courts to supervise legislation and keep it within the bounds of propriety and common sense.⁴⁵ The supreme court of Rhode

⁴² Nuth v. Tamplin, L. R. 8 Q. B. Div. 253.

⁴³ Reynolds v. Holland, 35 Ark. 56; Haney v. State, 34 Ark. 263.

⁴⁴ Randall v. Richmond & D. R. R. Co., 107 N. C. 748, 12 S. E. 605, 11 L. R. A. 460.

⁴⁵ Douglass v. Chosen Freeholders, 38 N. J. L. 214; Hyatt v. Taylor, 42 N. Y. 258, 262; Rosenplaenter v. Roessle, 54 id. 262; Bosley v. Mattingly, 14 B. Mon. 89; Abley v. Dale, 11 C. B. 391; Gwynne v. Burnell, 6

Bing. N. C. 559; Miller v. Salomons, 7 Ex. 475; Rex v. Banbury, 1 Ad. & E. 142; British Farmers', etc. Co., Re, 48 L. J. Ch. 56; Ornamental P. Woodwork Co. v. Brown, 2 H. & C. 63; Mirehouse v. Rennell, 1 Cl. & Fin. 546; Biffin v. Yorke, 5 Man. & Gr. 437; Rex v. Poor Law Commissioner, 6 Ad. & E. 7; May v. Great W. Ry. Co., L. R. 7 Q. B. 377; Clark v. Railroad Co., 81 Me. 477, 17 Atl. 497.

Island says: "It is an elementary proposition that courts only determine by construction the scope and intent of a law when the law itself is ambiguous or doubtful. If a law is plain, and within the legislative power, it declares itself and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh, would make the judicial superior to the legislative branch of the government, and practically invest it with the law-making power. The remedy for a harsh law is not in interpretation, but in amendment or repeal."⁴⁶

§ 368 (239). **The entire statute to be considered in ascertaining intent.**—The practical inquiry is usually what a particular provision, clause or word means. To answer it one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument. A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently each part or section should be construed in connection with every other part or section and so as to produce a harmonious whole.⁴⁷

⁴⁶ *State v. Duggan*, 15 R. I. 403, 6 Atl. 787.

⁴⁷ *Colorado Springs Live Stock Co. v. Godding*, 20 Colo. 71, 36 Pac. 884; *Board of County Com'rs v. Mineral Co.*, 9 Colo. App. 368, 48 Pac. 675; *Brown County v. Aberdeen*, 4 Dak. 402, 31 N. W. 735; *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551; *Soby v. People*, 134 Ill. 66, 25 N. E. 109; *People v. Chicago*, 152 Ill. 546, 38 N. E. 744; *Greenwood v. Gruelich*, 175 Ill. 526, 51 N. E. 565; *Swan v. Mulhevin*, 67 Ill. App. 77; *Mechanics' & Traders' L. & B. Ass'n v. People*, 72 Ill. App. 160; *Her-*

manek v. Guthman, 72 Ill. App. 370; S. C. affirmed, 179 Ill. 563; *County Board v. Short*, 77 Ill. App. 448; *Standard Radiator Co. v. Fox*, 85 Ill. App. 389; *Harrison v. People*, 92 Ill. App. 643; S. C. affirmed, *People v. Harrison*, 191 Ill. 257; *Iuka v. Schlossen*, 97 Ill. App. 222; *Gilbert v. Morgan*, 98 Ill. App. 281; *Board of Com'rs v. Board of Com'rs*, 128 Ind. 295, 27 N. E. 133; *Lime City B. & L. Ass'n v. Black*, 136 Ind. 544, 35 N. E. 829; *State v. Myers*, 146 Ind. 36, 44 N. E. 801; *State v. Robey*, 142 Ind. 168, 41 N. E. 145, 51 Am. St. Rep. 174, 33 L. R.

It is not proper to confine the attention to the one section to be construed.⁴⁸ "It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, into separate words, and then apply to each, thus separated from its context, some par-

- A. 213; *Goff v. Hankins*, 11 Ind. App. 456, 39 N. E. 294; *Long v. Schee*, 86 Iowa, 619, 53 N. W. 331; *Landrum v. Flannigan*, 60 Kan. 436, 56 Pac. 753; *Noecker v. Noecker*, 66 Kan. 347, 71 Pac. 815; *Danville v. Fiscal Court*, 21 Ky. L. R. 196, 51 S. W. 157; *Newbert v. Fletcher*, 84 Me. 408, 24 Atl. 889; *State v. Stiefel*, 74 Md. 546, 22 Atl. 1; *Osborn v. Charlevoix Circuit Judge*, 114 Mich. 655, 72 N. W. 982; *McCormick v. West Duluth*, 47 Minn. 272, 50 N. W. 128; *State v. Browne*, 56 Minn. 269, 57 N. W. 659; *Fitzgerald v. Rees*, 67 Miss. 473, 7 So. 341; *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528; *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; *Litson v. Smith*, 68 Mo. App. 397; *Westport v. Jackson*, 69 Mo. App. 148; *Scarritt v. County Court*, 89 Mo. App. 585; *State v. Moore*, 96 Mo. App. 431, 70 S. W. 512; *Lincoln v. Janesch*, 63 Neb. 707, 89 N. W. 280; *State v. Williams*, 68 N. H. 449, 42 Atl. 898; *Cate v. Martin*, 70 N. H. 135, 46 Atl. 54, 48 L. R. A. 613; *Scott v. Jersey City*, 68 N. J. L. 687, 54 Atl. 441; *Matter of Livingston*, 121 N. Y. 94, 24 N. E. 290; *New York v. Manhattan Ry. Co.*, 143 N. Y. 1, 37 N. E. 494; *Ingersoll v. Nassau Elec. R. R. Co.*, 157 N. Y. 453, 52 N. E. 545; *Manhattan Ry. Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790; *Staten Island Midland R. R. Co. v. Hinchliffe*, 170 N. Y. 473, 63 N. E. 545; *Gusthal v. Stron*, 23 App. Div. 315, 48 N. Y. S. 653; *People v. Hilliard*, 85 App. Div. 507, 83 N. Y. S. 204; *Chisholm v. Shields*, 21 Ohio C. C. 231; *Territory v. Clark*, 2 Okl. 82, 35 Pac. 882; *Lee v. Roberts*, 3 Okl. 106, 41 Pac. 595; *Durham v. Linderman*, 10 Okl. 570, 64 Pac. 15; *Lumberman's Exchange v. Lutz*, 2 Pa. Supr. Ct. 91; *Whitmire v. Muncy Creek*, 17 Pa. Supr. Ct. 399; *Bull v. Kirk*, 37 S. C. 395, 16 S. E. 151; *Evans v. Tillman*, 38 S. C. 238, 17 S. E. 49; *Walraven v. Farmers' & Merchants' Nat. Bank*, 96 Tex. 331, 74 S. W. 530; *Adams v. Sleeper*, 64 Vt. 544, 24 Atl. 990; *First National Bank v. Holland*, 99 Va. 495, 39 S. E. 126; *Offield v. Davis*, 100 Va. 250, 40 S. E. 910; *Puget Sound National Bank v. Seattle*, 9 Wash. 608, 38 Pac. 219; *Rhodes v. Iowa*, 170 U. S. 412, 18 S. C. Rep. 664, 42 L. Ed. 1088; *Knowlton v. Moore*, 178 U. S. 41, 20 S. C. Rep. 747, 44 L. Ed. 969; *Massachusetts L. & T. Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46; *Baggaley v. Pittsburg & L. S. Iron Co.*, 90 Fed. 686, 33 C. C. A. 202.
- ⁴⁸ *Ellis County v. Thompson*, 95 Tex. 22, 64 S. W. 927. In *Grimes v. Legion of Honor*, 97 Iowa, 315, 66 N. W. 183, it is said that when words are plain and unambiguous they should be given effect and that recourse should not be had to other parts of the statute.

ticular definition given by lexicographers, and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascertained from the context, the nature of the subject treated of and the purpose or intention of the parties who executed the contract, or of the body which enacted or framed the statute or constitution."⁴⁹ Another court says: "Statutes must receive a reasonable construction, reference being had to their controlling purpose, to all their provisions, force and effect being given not narrowly to isolated and disjointed clauses, but to their plain spirit, broadly taking all their provisions together in one rational view. Neither grammatical construction nor the letter of the statute nor its rhetorical framework should be permitted to defeat its clear and definite purpose to be gathered from the whole act, comparing part with part. . . . A statute must receive such reasonable construction as will, if possible, make all its parts harmonize with each other, and render them consistent with its scope and object."⁵⁰

The general intent should be kept in view in determining the scope and meaning of any part.⁵¹ This survey and

⁴⁹ *International Trust Co. v. Am. L. & I. Co.*, 62 Minn. 501, 65 N. W. 632.

⁵⁰ *Adams v. Yazoo & Miss. Val. R. R. Co.*, 75 Miss. 275, 22 So. 824; *Ellison v. Railroad Co.*, 36 Miss. 572; *Vinden v. Bowers*, 55 Miss. 18. Similar language will be found in *Neary v. Philadelphia*, etc. R. R. Co., 7 *Houst.* 419, 9 *Atl.* 405.

⁵¹ *People v. Harrison*, 191 *Ill.* 257, 61 *N. E.* 99; *Georgia v. Atkins*, 1 *Abb. (U. S.)* 22, *Fed. Cas. No.* 5350; *State v. Atkins*, 35 *Ga.* 819; *Harri-son, Ex parte*, 4 *Cow.* 63; *Strode v. Stafford Justices*, 1 *Brock.* 162;

Martin v. Hunter's Lessee, 1 *Wheat.* 304, 326, 4 *L. Ed.* 97; *People v. Stevens*, 13 *Wend.* 341; *People v. Morris*, *id.* 325; *Hopkins v. Haywood*, *id.* 265; *Little Rock, etc. R. Co. v. Howell*, 31 *Ark.* 119; *Swartwout v. Railroad Co.*, 24 *Mich.* 389; *City v. Schellinger*, 15 *Phila.* 50; *Regina v. Mallow Union*, 12 *Ir. C. L. (N. S.)* 35; *Nuth v. Tamplin*, *L. R.* 8 *Q. B. Div.* 253; *Ellison v. Mobile, etc. R. R. Co.*, 36 *Miss.* 572; *Bishop v. Barton*, 2 *Hun.* 436; *Shoemaker v. Lansing*, 17 *Wend.* 327; *People v. Commissioners*, 3 *Hill*, 601; *Parkinson v. State*, 14 *Md.* 184,

comparison are necessary to ascertain the purpose of the act and to make all the parts harmonious. They are to be brought into accord if practicable, and thus, if possible, give a sensible and intelligible effect to each in furtherance of the general design.⁵² A statute should be so construed, as a whole, and its several parts, as most reasonably to accomplish the legislative purpose.⁵³ It is said to be the most natural exposition of a statute to construe one part by another, for that expresses the meaning of the makers; this exposition is *ex verberibus actus*.⁵⁴ The words and meaning of one part may lead to and furnish an explanation of the sense of another.⁵⁵ "To discover," says Pollock, C. B., "the true construction of any particular clause of a statute, the first thing to be attended to, no doubt, is the actual language of the clause itself, as introduced by the preamble; second, the words or expressions which obviously are by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which, on comparison with other clauses, may reasonably and obviously be drawn. . . . If the comparison of one clause

74 Am. Dec. 522; Chesapeake & O. Canal Co. v. Railroad Co., 4 Gill & J. 1; Magruder v. Carroll, 4 Md. 335; Attorney-General v. Detroit, etc. Co., 2 Mich. 138; Ryegate v. Wardsboro, 30 Vt. 746; State v. Weigel, 48 Mo. 29; Nichols v. Wells, Sneed (Ky.), 255; Thompson v. Bulson, 78 Ill. 277; State v. Mayor, 35 N. J. L. 196; San Francisco v. Hazen, 5 Cal. 169; Taylor v. Palmer, 31 id. 240; Gates v. Salmon, 35 id. 576; Ogden v. Strong, 2 Paine, 584, Fed. Cas. No. 10,460; Wilson v. Biscoe, 11 Ark. 44; Lion Ins. Ass'n v. Tucker, L. R. 12 Q. B. Div. 180; Cope v. Doherty, 2 De G. & J. 614; Jefferys v. Boosey, 4 H. L. 815; Cearfoss v. State, 42 Md. 406; Commonwealth v. Duane, 1 Binn. 601;

Commonwealth v. Alger, 7 Cush. 53, 89.

⁵² Ogden v. Strong, 2 Paine, 584, Fed. Cas. No. 10,460; Clementson v. Mason, L. R. 10 C. P. 209. In construing the provisions of the Louisiana code the French text is to be looked to in clearing up obscurities and ambiguities in the English text. Viterbo v. Friedlander, 120 U. S. 707, 7 S. C. Rep. 962, 30 L. Ed. 776.

⁵³ Green v. State, 59 Md. 123, 43 Am. Rep. 542.

⁵⁴ Co. Litt. 381a.

⁵⁵ Mayor v. Howard, 6 Har. & J. 388; Martin v. O'Brien, 34 Miss. 21; City of San Diego v. Granniss, 77 Cal. 511, 19 Pac. 875.

with the rest of the statute makes a certain proposition clear and undoubted, the act must be construed accordingly, and ought to be so construed as to make it a consistent whole. If, after all, it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail."⁵⁶

§ 369 (240). General intent of statute key to meaning of the parts.—The presumption is that the law-maker has a definite purpose in every enactment, and has adapted and formulated the subsidiary provisions in harmony with that purpose; that these are needful to accomplish it; and that, if they have the intended effect, they will, at least, conduce to effectuate it. That purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms.⁵⁷ This intention affords a key to the sense and scope of minor provisions.⁵⁸ From this as-

⁵⁶ *Attorney-General v. Sillem*, 2 H. & C. 515.

⁵⁷ *Orange, etc. R. R. Co. v. Alexandria*, 17 Gratt. 176; *Jackson v. Bradt*, 2 Cal. 303; *Bryant, In re*, Deady, 118; *McCool v. Smith*, 1 Black, 459, 17 L. Ed. 218; *Rex v. Cornforth*, 2 Str. 1162; *Foster v. Collner*, 107 Pa. St. 305; *State v. Mann*, 21 Wis. 684; *Rice v. Railroad Co.*, 1 Black, 358, 377, 17 L. Ed. 147; *Chapman v. Miller*, 128 Mass. 269; *Eshleman's Appeal*, 74 Pa. St. 42, 46; *Bailey v. Commonwealth*, 11 Bush, 688; *Converse v. United States*, 21 How. 463, 16 L. Ed. 192; *Custin v. City of Viroqua*, 67 Wis. 314, 30 N. W. 515; *Ex parte Redmond*, 3 App. Cas. (D. C.) 317.

⁵⁸ *Wassell v. Tunnah*, 25 Ark. 101; *Burr v. Dana*, 22 Cal. 11; *Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352; *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130; *Felton v. West*, 102 Cal. 266, 36 Pac. 676; *Davis v. Hart*, 123

Cal. 384, 55 Pac. 1060; *Lee v. Barkhamsted*, 46 Conn. 213; *Mackall v. District of Columbia*, 16 App. Cas. (D. C.) 301; *Brewster v. Woolridge*, 100 Ga. 305, 28 S. E. 43; *Burke v. Monroe Co.*, 77 Ill. 610; *Harrison v. People*, 92 Ill. App. 643; S. C. affirmed, 191 Ill. 257; *Maxwell v. Collins*, 8 Ind. 38; *Crawfordsville, etc. T. Co. v. Fletcher*, 104 Ind. 97, 2 N. E. 243; *Fidelity L. & T. Co. v. Douglas*, 104 Iowa, 532, 73 N. W. 1039; *Adkinson v. Randle*, 93 Ky. 310, 20 S. W. 199; *Commercial Bank v. Foster*, 5 La. Ann. 316; *New Orleans v. Salamander Ins. Co.*, 25 La. Ann. 650; *Lake v. Caddo Parish*, 37 La. Ann. 788; *Berry v. Clary*, 77 Me. 482, 1 Atl. 360; *Negro Bell v. Jones*, 10 Md. 322; *Opinion of Justices*, 7 Mass. 523; *Somerset v. Dighton*, 12 Mass. 382; *Whitney v. Whitney*, 14 Mass. 88, 92; *Kingman et al., Petitioners*, 156 Mass. 361, 30 N. E. 820; *Jones v. Water Com'rs*, 34 Mich.

sumption proceeds the general rule that the cardinal purpose or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. The purpose for which a law was enacted is a matter of prime importance in arriving at a correct interpretation of its parts.⁵⁹ "A statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other will defeat such manifest object, it should receive the former construction."⁶⁰

273; *Ingraham v. Speed*, 30 Miss. 410; *McIntyre v. Ingraham*, 35 Miss. 25; *Ott v. Lowery*, 78 Miss. 487, 29 So. 520; *Ruggles v. Washington*, 3 Mo. 496; *State v. Walker*, 123 Mo. 56, 27 S. W. 363; *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772; *State v. Williams*, 35 Mo. App. 541; *State v. Ebbs*, 89 Mo. App. 95; *State v. Allen*, 43 Neb. 651, 62 N. W. 35; *Green v. Houston*, 45 Neb. 813, 64 N. W. 245; *State v. Mayor*, 35 N. J. L. 196; *Tonnele v. Hall*, 4 N. Y. 140; *Manhattan Ry. Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790; *Keith v. Quinney*, 1 Ore. 364; *Ex parte Ah Hoy*, 23 Ore. 89, 31 Pac. 220; *Toedtemeier v. Clackamas County*, 34 Ore. 66, 54 Pac. 954; *Commonwealth v. Council of Montrose*, 52 Pa. St. 391; *Smith v. Philadelphia*, 81 Pa. St. 38, 22 Am. Rep. 731; *Girard, etc. Co. v. Philadelphia*, 88 Pa. St. 393; *Big Block Creek, etc. Co. v. Commonwealth*, 94 Pa. St. 450; *Darcy v. Ruffel*, 3 Pa. Dist. Ct. 75; *North British, etc. Ins. Co. v. Craig*, 106 Tenn. 621, 62 S. W. 155; *Dear Bros. v. Marx*, 63 Tex. 298; *Edwards v. Morton*, 92 Tex. 152, 46 S. W. 792; *Catlin v. Hull*, 21 Vt. 152; *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302; *State v.*

Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243; *State v. Scott*, 36 W. Va. 704, 15 S. E. 405; *Hoentze v. Howe*, 28 Wis. 293; *Brewer v. Blougher*, 14 Pet. 178, 10 L. Ed. 408; *McCool v. Smith*, 1 Black, 459, 17 L. Ed. 218; *United States v. Saunders*, 22 Wall. 492, 22 L. Ed. 736; *Ruggles v. Illinois*, 108 U. S. 526, 2 S. C. Rep. 832, 27 L. Ed. 812; *Rhodes v. Iowa*, 170 U. S. 412, 18 S. C. Rep. 664, 42 L. Ed. 1088; *United States v. Jarvis, Davies*, 274, Fed. Cas. No. 15,468; *In re Matthews*, 109 Fed. 603; *Rex v. Inhabitants*, 1 T. R. 96; *Barber v. Waite*, 1 Ad. & E. 514; *Edwards v. Dick*, 4 B. & Ald. 212; *Colbran v. Barnes*, 11 C. B. (N. S.) 244; *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Brown v. G. W. R. Co.*, 9 Q. B. Div. 750; *Lion Ins. Co. v. Tucker*, 12 Q. B. Div. 186; *Monck v. Hilton*, 2 Ex. Div. 268; *Ex parte Hill*, 6 Ch. Div. 63.

⁵⁹ *Ellis County v. Thompson*, 95 Tex. 22, 31, 64 S. W. 927.

⁶⁰ *Re National Guard*, 71 Vt. 493, 45 Atl. 1051; *People v. Hinrichsen*, 161 Ill. 223, 43 N. E. 973. In *First National Bank v. Ludvigson*, 8 Wyo. 230, 236, 57 Pac. 934, 80 Am. St. Rep. 928, the court says: "It is true that the object and

§ 370 (241). **The intention of the whole act will control interpretation of the parts.**— Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject-matter and general purpose of the statute. No clearer statement has been or can be made of the law as to the dominating influence of the intention of a statute in the construction of all its parts than that which is found in Kent's Commentaries: "In the exposition of a statute the intention of the law-maker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion."⁶¹ If upon examination the general meaning and object of the statute be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to that purpose. But to warrant the change of the sense, according to the natural reading, to accommodate it to the broader or narrower import of the act, the intention of the legislature must be clear and manifest.⁶² The appli-

policy of a statute may be resorted to in aid of interpretation. But where plain and unambiguous words and phrases are employed in an act they should not be restricted in their operation by reference to the policy of the law, unless that policy is very clearly indicated in the act itself."

⁶¹ 1 Kent's Com. 461; Jennings v. Love, 24 Miss. 249; Harrison, Ex parte, 4 Cow. 63; People v. Utica Ins. Co., 15 John. 358; Strode v. Stafford Justices, 1 Brock. 162; State v. Clarksville, etc. Co., 2 Sneed, 88; Swann v. Buck, 40 Miss. 268; Learned v. Corley, 43 id. 688;

Little Rock, etc. R. R. Co. v. Howell, 31 Ark. 119; Matthews v. Commonwealth, 18 Gratt. 989; Swartwout v. Railroad Co., 24 Mich. 389; Russell v. Farquhar, 55 Tex. 359; Ezekiel v. Dixon, 3 Ga. 152; City v. Schellinger, 15 Phila. 50; Commercial Bank v. Foster, 5 La. Ann. 516; Kelly's Heirs v. McGuire, 15 Ark. 555; Cearfoss v. State, 42 Md. 406; Brooks v. Hicks, 20 Tex. 666; Wilkinson v. Leland, 2 Pet. 627, 662, 7 L. Ed. 542; Taylor v. Palmer, 31 Cal. 240; Commonwealth v. Conyng-ham, 66 Pa. St. 99.

⁶² Holbrook v. Holbrook, 1 Pick. 248.

cation of particular provisions is not to be extended beyond the general scope of a statute, unless such extension is manifestly designed. Legislatures, like courts, must be considered as using expressions concerning the thing they have in hand; and it would not be a fair method of interpretation to apply their words to subjects not within their consideration, and which, if thought of, would have been more particularly and carefully disposed of.⁶³ The mere literal construction ought not to prevail if it is opposed to the intention of the legislature apparent from the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effected, the law requires that construction to be adopted.⁶⁴ The intention of an act involves a consideration of its subject-matter, and the change in, or an addition to, the law which it proposes; hence the supreme importance of the rule that a statute should be construed with reference to its general purpose and aim. "Where the words," says Lush, J., "em-

⁶³ Estate of Ticknor, 13 Mich. 44.

⁶⁴ Cocciola v. Wood-Dickerson Supply Co., 136 Ala. 532; Fox v. Hale & U. S. Min. Co., 97 Cal. 353, 32 Pac. 446; Brown's Appeal, 72 Conn. 148, 44 Atl. 22, 49 L. R. A. 144; Brown County v. Aberdeen, 4 Dak. 402, 31 N. W. 735; Mackall v. District of Columbia, 16 App. Cas. (D. C.) 301; People v. Harrison, 191 Ill. 257, 61 N. E. 99; Gage v. Chicago, 201 Ill. 93, 66 N. E. 324; Gilbert v. Morgan, 98 Ill. App. 281; Lime City B. & L. Ass'n v. Black, 136 Ind. 544, 35 N. E. 829; Trustees of School Dist. v. Flemingsburg, 97 Ky. 702, 31 S. W. 722; In re Penobscot Lumbering Ass'n, 93 Me. 391, 45 Atl. 290; State v. McMahon, 65 Minn. 453, 68 N. W. 77; Adams v. Yazoo & Miss. Val. R. R. Co., 75 Miss. 275, 22 So. 824; Ott v. Lowery,

78 Miss. 487, 29 So. 520; Spencer v. Myers, 150 N. Y. 269, 44 N. E. 942, 55 Am. St. Rep. 675, 34 L. R. A. 175; Miller v. Maujer, 82 App. Div. 419, 8 N. Y. S. 575; Logan Natural Gas & F. Co. v. Chillicothe, 65 Ohio St. 186, 62 N. E. 122; Storrie v. Houston City St. Ry. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716; State v. Dohney, 72 Vt. 260, 47 Atl. 785; Talbot v. Silver Bow County, 139 U. S. 438, 11 S. C. 594, 35 L. Ed. 210; Pierce v. Van Dusen, 78 Fed. 693, 24 C. C. A. 280; Rigney v. Plaster, 88 Fed. 686; United States v. Bassett, 2 Story, 399, Fed. Cas. No. 14,539; Caledonian Ry. Co. v. North British Ry. Co., L. R. 6 App. Cas. 122; Freme v. Clement, 44 L. T. (N. S.) 399, L. R. 18 Ch. Div. 499; Walton, Ex parte, L. R. 17 Ch. Div. 746.

ployed by the legislature do not directly apply to the particular case, we must consider the object of the act.”⁶⁵

§ 371 (242). *Illustrations.*— Words of absolute repeal have been held to be qualified by the intention manifested in other parts of the same act.⁶⁶ One section of a statute provided that if a plaintiff recovered a sum “not exceeding” five pounds he should recover no costs; in another section, that if he recovered “less than” that sum, and the judge certified, he should recover costs. To make the statute fully answer the obvious intention to give a plaintiff costs, by certificate of the judge, for any recovery below the amount which would carry costs without a certificate, or where he recovered exactly five pounds, the latter provision was construed by reading “less than” as equivalent to “not exceeding.”⁶⁷ By the effect of comparison with the context birds were held not to be live animals.⁶⁸ In another case a minor, with living parents, was held to be an orphan for like reason.⁶⁹ In a Wisconsin statute the word “jury” was construed to refer to “one or more credible and disinterested persons,” sworn by an officer executing a writ of replevin, to testify as to the value of the property.⁷⁰ A statute which authorized a town to pay “all loans made in good faith” was held to authorize the payment of sums voluntarily advanced by individuals for the benefit of the town.⁷¹ By considering the mischief intended to be remedied by an act providing that “if any person shall take from any field not belonging to such person any cotton, corn, rice, or other grain, fraudulently, with the intent secretly to convert the same to the use of such person,” he should be guilty of “larceny,” it was held that the terms “cotton, corn, rice,” etc., embrace those articles in every possible form and variety

⁶⁵ *Williams v. Ellis*, L. R. 5 Q. B. Div. at p. 176.

⁶⁶ *Smith v. People*, 47 N. Y. 330.

⁶⁷ *Garby v. Harris*, 7 Ex. 591.

⁶⁸ *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566.

⁶⁹ *Ragland v. The Justices, etc.*, 10 Ga. 65, 71.

⁷⁰ *Williams v. McDonal*, 3 Pin. 331.

⁷¹ *Weister v. Hade*, 52 Pa. St. 474.

in which they can exist in a field; that they include them in a growing and unripe state.⁷² An act was passed incorporating a company to construct a road from a designated point in the city of Baltimore, in a direct line, about due north, to another point named, but it was forbidden to lay out and extend the road through the buildings, yards, or orchards of any farm without the consent of the owner. It was held that the act was passed for the public convenience and benefit; that the prohibitory restriction should be construed as requiring and authorizing a deviation or change in the location of the road at such points from the prescribed route, to prevent a *cesser* of the corporate franchise in case the consent of the owner could not be obtained.⁷³

§ 372 (243). A bankruptcy act provided that all the property acquired by the bankrupt "during the continuance" of the bankruptcy should be divisible among his creditors. It provided, also, that he might obtain his discharge not only at the close but during the continuance of his bankruptcy. By considering the various provisions, it was construed that the former provision should be read in substance as meaning that the future property which was to be divisible was that acquired either during the continuance of the bankruptcy or before the earlier discharge of the bankrupt.⁷⁴ James, L. J., said: "It is a cardinal principle in the interpretation of a statute that, if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other."⁷⁵ An act to prevent injury from "furiously driving any sort of carriage" was held to include a bicycle.⁷⁶ A statute required notice to a surveyor, or some municipal officer, for a period not less than twenty-four hours prior to an accident, to render a town liable for an injury from a defect in a highway. This requirement was

⁷² *State v. Stephenson*, 2 Bailey, 334.

⁷³ *Charles St. Ave. Co. v. Merryman*, 10 Md. 536.

⁷⁴ *Ebbs v. Boulnois*, L. R. 10 Ch. 479.

⁷⁵ *Id.*

⁷⁶ *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228.

literally absolute by the terms of the statute; but it was held that where the defect was caused by the surveyor while acting as agent of the town, such notice was not necessary; for the purpose of the act did not require notice to an officer of his own act. Under such circumstances, when the reason of the law ceases, the law ceases.⁷⁷ A statute in general terms made it a punishable offense for any person to carry or transport from place to place the carcass or hide of any of the animals forbidden to be killed within certain periods. By construction it was held inapplicable to the carrying of the hide of an animal during that period if it had been killed while it was lawful to kill it. It was held proper to decide in contravention of the terms of a statute when necessary to reach its spirit and obvious intent.⁷⁸ A statutory requirement to give notice to an officer, before suit brought, "for anything done, or intended to be done," under the authority of the act, was held to apply to a non-feasance for things omitted to be done.⁷⁹ The charter of a cemetery company provided that a certain number of acres of land "shall be forever appropriated and set apart as a cemetery, which, so long as used as such, shall not be liable to any tax or public imposition whatever." This was held not to apply to a tax levied for paving a street in front of the property; the intent was to exempt the property from all taxes or impositions for purposes of revenue, but not to relieve it from such charges as are inseparably incident to its location in regard to other property.⁸⁰

§ 373 (244). A statute of Missouri provides that life assurance companies should not commence or continue to do business until, besides complying with certain regulations touching their capital, they shall each have at least \$100,000

⁷⁷ *Holmes v. Paris*, 75 Me. 559.

⁷⁸ *Allen v. Young*, 76 Me. 80; *Commonwealth v. Hall*, 128 Mass. 410.

⁷⁹ *Poulsum v. Thirst*, L. R. 2 C. P. 449; *Wilson v. Hafax*, L. R. 3 Ex. 114; *Davis v. Curling*, 8 Q. B. 286.

⁸⁰ *Mayor, etc. v. Green Mount Cemetery*, 7 Md. 517. See *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129.

of capital paid in and invested in the stocks or bonds of the state of Missouri, or in treasury notes or stocks of the United States, or in notes or bonds secured by mortgages or deeds of trust on unincumbered real estate worth at least double the amount loaned thereon, etc. This provision was construed to require "the mortgages or deeds of trust" to be taken on real estate situate in Missouri. The statute in its letter was silent on this point, but it was plainly perceivable that its object was to afford ample protection and indemnity to the policy-holder; and in order to give effect to that intention, the court announce and proceed upon this principle: that when it is plainly perceivable that a particular intention, though not precisely expressed, must have been in the mind of the legislature, that intention will be enforced and carried out and made to control the strict letter.⁸¹ Though a statute gives inaccurate names to things, if the court can discern its meaning, it will so expound it as to give force to the intention of the legislature; thus, it seems a statutory requirement of the "great seal of Great Britain (used improperly, since the old great seal was, soon after the union with Ireland, destroyed in the presence of the lord chancellor) is substantially satisfied by the use of the great seal of the United Kingdom."⁸²

§ 374 (245). **The flexibility of words and clauses to harmonize with general intent.**— The natural import of words is their literal sense; but this may be greatly varied to give effect to the fundamental purpose of a statute.⁸³ The gen-

⁸¹ *State v. King*, 44 Mo. 283.

⁸² *Dwarris on St.* 614; *Rex v. Bullock*, 1 Taunt. 80.

⁸³ *Mason v. Finch*, 2 Scam. 223; *Board of County Com'rs v. Hall*, 9 Colo. App. 538, 49 Pac. 370; *Burke County v. Monroe Co.*, 77 Ill. 610; *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; *People v. Chicago*, 152 Ill. 546, 38 N. E. 744; *Landrum v. Flannigan*, 60 Kan. 436, 56 Pac. 753; *State v.*

Browne, 56 Minn. 269, 57 N. W. 659;

McIntyre v. Ingraham, 35 Miss. 25;

Cole v. Skrainka, 105 Mo. 303, 16

S. W. 491; *Andrew County v.*

Schell, 135 Mo. 31, 36 S. W. 206;

Gusthal v. Strong, 23 App. Div. 315,

48 N. Y. S. 652; *Henry v. Trustees*,

48 Ohio St. 671, 30 N. E. 1122; *Ex*

parte Ah Hoy, 23 Ore.-89, 31 Pac.

220; *Lawrence County v. Meade*

County, 6 S. D. 528, 62 N. W. 131;

Rose v. Wortham, 95 Tenn. 505, 32

eral object of a statute was to restore uniformity in taxation in counties and cities; to effect this, existing laws relating to incorporated towns and cities had to be repealed, that the provisions of the act applicable in terms to both might have effect. There was a repealing clause in the act that "all laws requiring *any city* to support and provide for its paupers, etc., are hereby repealed." One question which came before the court was whether the clause included laws so providing for *incorporated towns*; the decision was in the affirmative. The court followed the rule laid down in *Mason v. Finch*,⁸⁴ that, "in construing statutes, courts look at the language of the whole act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the statute, if, upon a view of the whole act, they can collect from the more large and extensive expressions used in the other parts the real intention of the legislature, it is their duty to give effect to the larger expression." The court say: "Even if the word city was not sufficiently comprehensive to embrace incorporated towns, yet under the rule announced in the case [referred to], it cannot be doubted that the larger and more extensive signification was intended by the use of the word city."⁸⁵ The converse is illustrated by the example of a statute which required a *notice* to be *given*, under which undoubtedly either a written or verbal notice would suffice.⁸⁶ But as a subsequent section required the notice to be served on a person, or *left* with him, thus employing words implying a written notice, the notice to be given was construed to mean a notice in writing.⁸⁷ The seemingly incongruous

S. W. 458, 30 L. R. A. 609; Board of School Directors v. Board of School Directors, 81 Wis. 428, 51 N. W. 871; McKee v. United States, 164 U. S. 287, 17 S. C. Rep. 92, 41 L. Ed. 437; Commonwealth v. Reynolds, 89 Ky. L. R. 147, 12 S. W. 132, 20 S. W. 167; State v. Sioux City & N. R. Co., 43 Minn. 17, 44 N. W. 1032.

⁸⁴ 2 Scam. 223.

⁸⁵ Burke v. Monroe County, 77 Ill. 610.

⁸⁶ Vinton v. Builders', etc. Ass'n, 109 Ind. 351, 9 N. E. 177.

⁸⁷ Wilson v. Nightingale, 8 Q. B. 1034; Moyle v. Jenkins, 51 L. J. Q. B. 112; L. R. 8 Q. B. Div. 116.

provisions must be so construed as to harmonize with the general intent manifested in the whole enactment.⁸⁸

§ 375. Same — Illustrations.— A statute provided that, if any party obtaining a verdict in his favor should give to any of the jurors in the cause, before or after verdict and during the term, “any victuals or drink” by way of treat, the verdict should be set aside. Treating with cigars was held to be within the statute.⁸⁹ A lessee having the control of a reservoir and being under obligation to complete and maintain it was held to be an *owner* within the intent of a statute providing that “the owners of reservoirs shall be liable for all damages arising from leakage or overflow of water therefrom or by floods caused by the breaking of the embankments of such reservoirs.”⁹⁰ An act required county boards to appoint “some suitable graduate of medicine” to attend the indigent sick. This was held to mean not necessarily a graduate of a medical school, but any one licensed to practice medicine pursuant to the statutes of the state. “It cannot be said,” says the court, “that the meaning of the words is clear, and in such a case the statute should be given such construction as will not deprive the person interested in its construction of a substantial right.”⁹¹ An act to create a railroad commission and provide for the supervision, regulation and control of railroads contained a

⁸⁸ Commonwealth v. Conyngham, 66 Pa. St. 99; Wilkinson v. Leland, 2 Pet. 627, 662, 7 L. Ed. 542.

⁸⁹ Baker v. Jacobs, 64 Vt. 197, 23 Atl. 588. The court says: “The evil against which the legislature has sought to guard and has intended to suppress from its earliest enactment on this subject to the present time has been to prevent jurors from being biased by being treated by a party to the suit before rendering their verdict or by the hope or expectation of being treated after they should render it,

and to prevent a suitor from directly or indirectly seeking to influence a verdict in his favor by such means. This has been the policy of our law for a century, and we think the furnishing a juror with a cigar by way of treat is as much within the true intent and spirit of the statute as the treating him with a glass of whiskey.” p. 201.

⁹⁰ Larimer Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111.

⁹¹ People v. Eichelroth, 78 Cal. 141, 20 Pac. 364.

provision that "*appeals* by either party shall lie from judgments, orders and decrees of inferior courts, in all suits and cases brought under the provisions of this act, to the same extent that appeals lie in similar suits and cases brought under any other law in this state." It was held that the word *appeals* was used in its popular, broadest and most comprehensive sense and included any and all appropriate appellate proceedings provided by law for reviewing judgments, orders and decrees, whether by writ of error, or by an appeal proper in its strictest technical sense.⁹² An act which in terms applied to companies was held to include individuals engaged in the same business.⁹³ An act provided that no person should be eligible to the office of county attorney "who is not duly admitted to practice as an attorney in some court of record in this territory." The court says: "The statute, it is true, does not say in terms that he must not have been disbarred from practice in the very court in which the law requires him to perform certain professional duties, but the terms of the act show that this was within the reason and intent of the legislature. It was within the purpose and spirit of the act, and that which is within the reason, purpose and intention of the language used is as much within the act as though it were a part of the language itself."⁹⁴ An act of congress provided for appeals from certain quasi-judicial tribunals in the Indian Territory to the "United States district court." There was no court of that name in the territory and the language was construed to mean the United States court for the territory.⁹⁵ An act of congress provided that all intoxicating liquors transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, *should, upon arrival in such state or territory*, be

⁹² *State v. Jacksonville Terminal Co.*, 41 Fla. 363, 27 So. 221.

⁹³ *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497.

⁹⁴ *Brown v. Woods*, 2 Okl. 601, 39 Pac. 473.

⁹⁵ *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 S. C. Rep. 722, 43 L. Ed. 1041.

subject to the laws of such state or territory to the same extent as if produced therein. It was held that the words in italics were not to be taken literally as meaning arrival at the state line, but arrival at destination including delivery to the consignee. "The subtle signification of words," says the court, "and the niceties of verbal distinction furnish no safe guide for construing the act of congress."⁹⁶ An act which authorized the purchase, or if necessary the appropriation, of land for cemetery purposes, provided that no land should be *so appropriated* within two hundred yards of any dwelling-house. It was held that the intent was to prevent the evil effects of a cemetery within the specified distance of a dwelling, and that the words *so appropriated* should be read in the sense of *devoted* to the purpose in question and so as limiting the acquisition of property by contract or condemnation.⁹⁷ An act provided that life insurance effected by the husband on his own life should inure to the benefit of the widow and next of kin to be distributed as personal property, free from the claims of the husband's creditors. The act was held to apply to insurance effected by the husband before his marriage.⁹⁸

§ 376 (246). **The literal sense not controlling.**—The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention.⁹⁹ The intent prevails

⁹⁶ Rhodes v. Iowa, 170 U. S. 412, 18 S. C. Rep. 664, 42 L. Ed. 1088.

⁹⁷ Henry v. Trustees, 48 Ohio St. 671, 30 N. E. 1122.

⁹⁸ Rose v. Wortham, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609.

⁹⁹ Caledonian Ry. Co. v. North British Ry. Co., L. R. 6 App. Cas. 114; Freme v. Clement, 44 L. T. (N. S.) 399; L. R. 18 Ch. Div. 499; Holyland v. Lewin, 26 id. 266; Wal-

ton, Ex parte, L. R. 17 Ch. Div. 756; United States v. Bassett, 2 Story, 389, Fed. Cas. No. 14,539; People v. Craycroft, 111 Cal. 544, 44 Pac. 463; Davis v. Hart, 123 Cal. 384, 55 Pac. 1060; Pool v. Simmons, 134 Cal. 621, 66 Pac. 872; Mackall v. District of Columbia, 16 App. Cas. (D. C.) 301; In re Penobscot Lumbering Association, 93 Me. 391, 45 Atl. 290; Kingman et al., Petitioners, 156

over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.¹ "While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words."² Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions.³ Where general language construed in a broad sense would lead to absurdity it may

Mass. 361, 30 N. E. 820; *Adams v. Yazoo & Miss. Val. R. R. Co.*, 75 Miss. 275, 22 So. 824; *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491; *State v. Ross*, 20 Nev. 61, 14 Pac. 827; *Spencer v. Myers*, 150 N. Y. 269, 44 N. E. 942, 55 Am. St. Rep. 675, 34 L. R. A. 175; *People v. Briggs*, 47 Hun. 266; *Territory v. Clark*, 2 Okl. 82, 35 Pac. 882; *Baker v. Jacobs*, 64 Vt. 197, 23 Atl. 588; *Adams v. Sleeper*, 64 Vt. 544, 24 Atl. 990; *Rhodes v. Iowa*, 170 U. S. 412, 18 S. C. Rep. 664, 42 L. Ed. 1038; *People's Savings Bank & T. Co. v. Batchelder Egg Case Co.*, 51 Fed. 130, 2 C. C. A. 126, 4 U. S. App. 603.

¹ *Brown's Appeal*, 72 Conn. 148, 44 Atl. 22, 49 L. R. A. 144; *Brown County v. Aberdeen*, 4 Dak. 402, 31 N. W. 735; *People v. Harrison*, 191 Ill. 257, 61 N. E. 99; S. C., 92 Ill. App. 643; *Gilbert v. Morgan*, 98 Ill. App. 281; *Lime City B. L. & S. Ass'n v. Black*, 136 Ind. 544, 35 N. E. 829; *Kane v. Kansas City, etc. Ry. Co.*, 112 Mo. 34, 20 S. W. 532; *Logan Natural Gas & F. Co. v. Chillicothe*, 65 Ohio St. 186, 62 N. E. 112; *Rigney v. Plaster*, 88 Fed. 686.

² *Pierce v. Van Dusen*, 78 Fed. 693, 696, 24 C. C. A. 280.

³ *Commercial Bank v. Foster*, 5

La. Ann. 516; *Barker v. Esty*, 19 Vt. 131, 139; *Simonds v. Powers*, 28 id. 354; *Phillips v. State*, 15 Ga. 518; *Thompson v. Farrer*, 9 Q. B. Div. 372; *State v. Weigel*, 48 Mo. 29; *Clementson v. Mason*, L. R. 10 C. P. 209; *Covington v. McNickle*, 18 B. Mon. 262; *Atkins v. Disintegrating Co.*, 18 Wall. 272, 302, 21 L. Ed. 841; *Smith v. Adams*, 5 De Gex, M. & G. 712; *Dano v. Railroad Co.*, 27 Ark. 564; *Powdrell v. Jones*, 2 Smale & G. 407; *Olive v. Walton*, 33 Miss. 114; *Williams v. McDonal*, 3 Pin. 331; *Ayers v. Knox*, 7 Mass. 306; *City of San Diego v. Granniss*, 77 Cal. 511, 19 Pac. 875; *Board of County Com'rs v. Hall*, 9 Colo. App. 538, 49 Pac. 370; *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; *People v. Chicago*, 152 Ill. 546, 38 N. E. 744; *Andrew County v. Schell*, 135 Mo. 31, 36 S. W. 206; *Rose v. Wortham*, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609; *McKee v. United States*, 164 U. S. 287, 17 S. C. Rep. 92, 41 L. Ed. 437; *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 S. C. Rep. 722, 43 L. Ed. 1041; *United States v. Pine River Logging & Imp. Co.*, 89 Fed. 907, 32 C. C. A. 406.

be restrained.⁴ The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act. The sense in which they were intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning is to be given according to the intention thus indicated.⁵ In an act providing for raising state taxes, railroads were taxed on the basis of passenger traffic, and it was provided that every railroad paying such tax should not be assessed "with any tax on its lands, buildings or equipments." This exemption was confined to the taxes of the kind provided for in the act, and was held not to conflict with another act for a municipal tax.⁶ A public board, in terms authorized to adjust *all* claims against their respective counties, were held not empowered to adjust their own; the general power was construed to refer to claims presented to them and not to make them judges in their own cases.⁷ When the intent is plain, words and even parts of sentences may be transposed to carry it into effect.⁸ Restrictive clauses significant of the intent in certain provisions may be supplied by intendment in others.⁹ General words do not always extend to every case which literally falls within them.¹⁰ When the intention can be collected from the statute itself, words may be modified, altered, supplied or dis-

⁴ *People v. Davenport*, 91 N. Y. 574.

⁵ *Board of County Com'rs v. Hall*, 9 Colo. App. 538, 49 Pac. 370; *State v. Bentley*, 39 Neb. 353, 55 N. W. 962; *McIntyre v. Ingraham*, 35 Miss. 25, citing *Mitchell v. Mitchell*, 5 Madd. 72; *Hotham v. Sutton*, 15 Ves. 320; *Stuart v. Earl of Bute*, 3 id. 212. See also *City of San Diego v. Grannis*, 77 Cal. 511.

⁶ *Orange, etc. R. R. Co. v. Alexandria*, 17 Gratt. 176; *Beawfage's Case*, 10 Coke, 99f

⁷ *Kennedy v. Gies*, 25 Mich. 83.

⁸ *Cunningham v. State*, 2 Speers, 246; *State v. Turnpike Co.*, 16 Ohio St. 308; *Canal Com'rs v. Sanitary District*, 184 Ill. 597, 56 N. E. 953. See *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869.

⁹ *Bode v. State*, 7 Gill, 328; *Adams v. Yazoo & Miss. Val. R. R. Co.*, 75 Miss. 275, 22 So. 824.

¹⁰ *Lawrence County v. Meade County*, 6 S. D. 528, 63 N. W. 131; *Jefferys v. Boosey*, 4 H. L. 815.

regarded so as to obviate any repugnance or inconsistency with such intention.¹¹ The context is not allowed to change the effect of a section or word where it appears to be the intention that it should be literally construed; in other words, if the true meaning of a word or phrase is apparent from the section in which it occurs, it is not admissible to go outside of it for an interpretation.¹² This mode of construction by reference to the subject-matter and purpose of a statute is applicable to all statutes civil and criminal. If there is an express declaration of the intent and meaning of the statute by the provisions contained in it, all other parts of the act are controlled in construction to serve that intent.¹³

§ 377. **Same — Illustrations.**— A statute of Wisconsin provides that the circuit and superior courts may dismiss any and all actions and proceedings pending therein in which issue shall have been joined and which shall not be brought to trial within five years from and after their *commencement*. It was held that the word *commencement* did not necessarily refer to the original inception of the suit or proceeding but to the commencement of the jurisdiction of the court over the case, that the intent of the statute was that the suit or proceeding must have been pending in the court for five years, and that it was error to dismiss an action brought to the court by appeal more than five years after its original commencement. The opinion is an instructive one and we quote as follows: “Uncertainty of sense does

¹¹ *Quin v. O’Keeffe*, 10 Ir. C. L. 66 N. E. 374; *Conrad v. Crowdsen*, (N. S.) 393; *Brinsfield v. Carter*, 2 75 Ill. App. 614.

Ga. 150; *Wainwright, In re*, 1 ¹²*Spencer v. Metropolitan Board*, Phil. 258; *Rice v. Railroad Co.*, 1 L. R. 22 Ch. Div. 162; *Egerton v. Black*, 358, 17 L. Ed. 147; *Walton*, Third Municipality, 1 La. Ann. 435; *Ex parte*, L. R. 17 Ch. Div. 746; *Depas v. Riez*, 2 id. 30; *Warehouse Co. v. Lewis*, 56 Ala. 514; *Blackwood v. Queen*, L. R. 8 App. Cas. 96; *Pitte v. Shipley*, 46 Cal. 154.

People v. English, 139 Ill. 622, 29 N. E. 678; *Peoria & P. U. R. R. Co. v. People*, 144 Ill. 458, 33 N. E. 873; *People v. Gaulter*, 149 Ill. 39, 36 N. ¹³*Farmers’ Bank v. Hale*, 59 N. E. 576; *Gage v. Chicago*, 201 Ill. 93, Y. 53.

not alone spring from uncertainty of expression. It is always presumed, in regard to a statute, that no absurd or unreasonable result was intended by the legislature. Hence if, viewing a statute from the standpoint of the literal sense of its language, it is unreasonable or absurd, an obscurity of meaning exists calling for judicial construction. We must, in that event, look to the act as a whole, to the subject with which it deals, to the reason and spirit of the enactment, and thereby, if possible, discover its real purpose; and if such purpose can reasonably be said to be within the scope of the language used, it must be taken to be a part of the law the same as if it were plainly expressed by the literal sense of the words used. In that way, while courts do not, and cannot properly, bend words out of their reasonable meaning to effect a legislative purpose, they do give to words a liberal or strict interpretation within the bounds of reason, sacrificing literal sense and rejecting every interpretation not in harmony with the evident intent of the law-makers, rather than that such intent shall fail.”¹⁴ The code of Mississippi provides for the election of aldermen and certain municipal officers in December and that they enter upon their duties on the first Monday of the following January. It also provides that the regular meetings of the board of aldermen shall be held on the first Tuesday of each month, and that at the first regular meeting succeeding the annual election they shall appoint certain municipal officers. In the year 1901 the first Tuesday of January came before the first Monday and the old board of aldermen, at its regular meeting on the first Tuesday, following the letter of the statute, appointed the municipal officers in question. In a contest over the right to one of these offices the court held that the intent of the act was that the new board should appoint the officers for the year and declared the action of the old board illegal and nugatory.¹⁵ An act

¹⁴ *Rice v. Ashland County*, 108 So. 520. The court, referring to the *Wis.* 189, 192, 84 N. W. 189. opposite contention, says: “Such

¹⁵ *Ott v. Lowery*, 78 Miss. 487, 29 construction is manifestly opposed

approved April 8, 1890, required every corporation incorporated "since January 1, 1890," to pay a certain bonus tax. It was contended that the word *since* could only mean the time from January 1 to the taking effect of the act, but the court, while conceding this to be the literal meaning of the word, construed it to mean *after*, and so included corporations organized after January 1, 1890, without limit of time. The court says: "We are not, however, dealing with a question of mere philology. What we have to do is to discover the legislative intention and to give to it, when ascertained in accordance with established canons and rules, full and complete effect. The mere words which the legislature may use are not always controlling. If the obvious purpose of an enactment is beyond the literal meaning of the language employed, it will not be restricted in its scope and application by the narrow significance of its words; and equally, too, broad and comprehensive terms will not include that which is not within the design and the object of the statute. The real intent, when ascertained, will always prevail over the literal sense of the language; because both the canons of verbal criticism and the rules of grammatical construction must alike yield to the manifest spirit and intent of an enactment."¹⁶ A statute required every railroad company under a penalty to erect a post or frame at every highway crossing with an inscription thereon, "Look out for the locomotive." In a prosecution under the

to the whole spirit and scope of the chapter. It would permit a board which had been defeated at an election, on the very issue of who the tax collector should be, to elect, when the first Tuesday of January came before the first Monday, that person tax collector who had been repudiated at the polls, where, as might occur, his re-election was made a matter of preference and instruction by the voters. The plain purpose of the code

provisions was that the new board — the incoming administration — should choose the clerk, the tax collector and the police justice unembarrassed by any opposition on the part of the retiring board. The new administration is the one with which the new subordinate officers are to work, and is responsible to the people for making a wise selection." p. 498.

¹⁶ *Roland Park Co. v. State*, 80 Md. 448, 31 Atl. 298.

statute it was held that an erection with an inscription "Railroad crossing," though not within the letter, was within the spirit of the statute, and conformed to the meaning of the law and the intention of its maker.¹⁷ A statute imposed a penalty upon any person who should cruelly beat or ill treat any *child*. It was held that a boy of the strength and stature of a man was not within the statute; that the statute was intended for the protection of those of tender years who were unable to protect themselves.¹⁸ A statute required the secretary of state to deliver three hundred copies of the annual reports required to be made by state officers "to the officer making the report for his use." This was held not to mean for the personal or private use of the officer, but for distribution by him.¹⁹ A statute provided that every policy or certificate of insurance issued "by any corporation of *this state* doing business in conformity with the provision of this article" should specify the exact sum payable on the happening of the contingency insured against. The act was held to cover both foreign and domestic companies operating within the state. The court says: "The foreign corporation entering this state, complying with our laws, subjecting itself to the jurisdiction of our courts and pursuing its business, does become a corporation of this state in the sense of the statute."²⁰

§ 378. *Same* — *Illustrations continued*.—An act supplementary to the Nevada militia law provided that "all officers and members of the volunteer militia of this state, *on becoming members and performing duty*, must take and subscribe the following oath," etc. The statute was held to apply to those already members as well as to those afterwards becoming members, the former being as much within the reason and intent of the law as the latter.²¹ A Cali-

¹⁷ *State Board v. Mobile & O. R. R. Co.*, 72 Miss. 236, 16 So. 489.

²⁰ *Goodson v. National Masonic Acc. Ass'n*, 91 Mo. App. 339.

¹⁸ *Collins v. State*, 97 Ga. 433, 25 S. E. 325, 35 L. R. A. 501.

²¹ *State v. Ross*, 20 Nev. 61, 14 Pac. 827.

¹⁹ *Madden v. Hardy*, 92 Tex. 613, 50 S. W. 926.

fornia statute required every railroad company, upon tender of the fare therefor, to furnish to every person desiring a passage on their passenger cars a ticket entitling the purchaser to the transportation desired, and also provided that such ticket should entitle the holder to stop at any intermediate station and to resume his journey to the point of destination at any time within six months thereafter, and imposed a penalty of two hundred dollars for each violation, to be paid to the person refused accommodations as provided. The defendants went about systematically to get up cases of violation and had secured about three thousand refusals, and had commenced about seven hundred suits against the plaintiff. The plaintiff, the Southern Pacific Railroad Company, brought suit to enjoin actions for these violations, setting up the acts and purposes of the defendant, and obtained the relief sought. The court held that the benefit of the act accrued only to those who in good faith applied for the tickets and stop-over privileges and who really desired to make the passage or stop-over applied for.²²

A mechanic's lien statute was amended so as to provide that "when the improvement consists of two or more buildings united together and situated on the same lot or contiguous lots, or of separate buildings upon contiguous lots and erected under one general contract, it shall not be necessary to file a separate lien upon each building," etc. It was held that the amendment applied to separate buildings on the same lot and erected under one contract, and that this case was within the reason and intent of the law, though not within the letter.²³ A statute provided for certain fees to be paid by corporations thereafter organized, and then provided that all corporations "at present organized and doing business under the laws of this state that may hereafter increase their capital stock" should pay certain fees on account of such increase. It was held that the intent of the

²²*Southern Pac. R. R. Co. v. Robinson*, 132 Cal. 408, 64 Pac. 572.

²³*Cocciola v. Wood-Dickerson Supply Co.*, 136 Ala. 532.

act was that the fees to be paid on account of the increase of capital stock should be paid by all corporations making such increase, whether they were organized before or after the act passed, and the act was so construed and applied. The court says: "In construing an act it is a principle of interpretation that the object must be borne in mind, and language susceptible of more than one construction should receive that which will effect its purpose rather than defeat it. A presumption is always indulged in favor of the constitutionality of an act, and that construction will be adopted which will sustain the act, where the language used will permit such interpretation. In construction, words may be restricted or enlarged, according to the intent with which they were used, and their meaning as used may be gathered from the purpose of the enactment. And when necessary that which is implied as well as that which is expressed may be held to be included within a statute."²⁴

Illustrations could be multiplied indefinitely, but the foregoing will suffice. The curious reader will find a variety of new applications of the same principles in the cases cited below.²⁵

²⁴ *People v. Hinrichsen*, 161 Ill. 223, 226, 43 N. E. 973.

²⁵ *Milburn v. State*, 1 Md. 17; *State v. King*, 44 Mo. 283; *Crocker v. Crane*, 21 Wend. 211, 34 Am. Dec. 228; *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580; *Attorney-General v. Kwok-A-Sing*, L. R. 5 P. C. 179; *Brown v. Hamlett*, 8 Lea, 732; *Brown v. Barry*, 3 Dall. 365; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *Binney v. Canal Co.*, 8 Pet. 201, 8 L. Ed. 917; *Kennedy v. Kennedy*, 2 Ala. 571; *Thompson v. State*, 20 id. 54; *Sprowl v. Lawrence*, 33 id. 674; *Big Black Creek, etc. Co. v. Commonwealth*, 94 Pa. St. 450; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Ex parte*

Ellis, 11 Cal. 222; *Simonds v. Powers*, 28 Vt. 354; *Burr v. Dana*, 22 Cal. 11; *Bell v. New York*, 105 N. Y. 139, 11 N. E. 495; *State v. Poydras*, 9 La. Ann. 165; *Allen v. Parish*, 3 Ohio, 198; *Keith v. Quinney*, 1 Ore. 364; *Reynolds v. Holland*, 35 Ark. 56; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Murray v. Railroad Co.*, 4 Keyes, 274; *Jackson v. Collins*, 3 Cow. 89; *Holmes v. Paris*, 75 Me. 559; *Matthews v. Commonwealth*, 18 Gratt. 989; *Cearfoss v. State*, 43 Md. 406; *Learned v. Corley*, 43 Miss. 687; *Moyce v. Newton*, 4 Q. B. Div. 32; *Walton, Ex parte*, L. R. 17 Ch. Div. 756; *Caledonian Ry. Co. v. North B. Ry. Co.*, L. R. 6 App. Cas. 122; *Russell v.*

§ 379. **Letter and intent.**—"A thing which is within the object, spirit and the meaning of the statute is as much within the statute as if it were within the letter."²⁶ Conversely, a thing which is not within the intent and spirit of a statute is not within the statute, though within the letter.²⁷ An act to regulate the assignment of notes secured by chattel mortgage and the sale under such mortgages, provided that the notes secured by chattel mortgage should state upon their face the fact of such security, and that, when assigned, they should be subject to the same defenses as between the original parties, and also provided that if the notes

Farquhar, 55 Tex. 355; Gravett v. State, 74 Ga. 191; Somerset v. Dighton, 12 Mass. 382; Holbrook v. Holbrook, 1 Pick. 248; Miller v. Salomons, 7 Ex. 475; Attorney-General v. Lockwood, 9 M. & W. 398; Becke v. Smith, 2 M. & W. 195; Wright v. Williams, 1 id. 99; Hollingworth v. Palmer, 4 Ex. 267; Reg. v. Spratley, 6 E. & B. 363; Crespigny v. Wittenoom, 4 T. R. 790; Brewer v. Blougher, 14 Pet. 178, 10 L. Ed. 408; Atkins v. Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841; Maxwell v. Collins, 8 Ind. 38; Larzelere v. Haubert, 109 Pa. St. 515; Sheetz v. Hanbest, 81 id. 100; Wiener v. Davis, 18 id. 331; Jackson v. Bradt, 2 Cal. 169; Packer v. Noble, 103 Pa. St. 188; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Wheeler v. McCormick, 8 Blatchf. 267, Fed. Cas. No. 17,498; State v. Sears, 115 Iowa, 28, 87 N. W. 735; Adkinson v. Randle, 93 Ky. 310, 20 S. W. 199; Commercial B. & L. Ass'n v. Mackenzie, 85 Md. 132, 36 Atl. 754; State v. Jones, 102 Mo. 305, 14 S. W. 946, 15 S. W. 556; Cole v. C., B. & Q. R. R. Co., 47 Mo. App. 624; Kreyling v. O'Reilly, 97 Mo. App. 384, 71 S. W.

372; Storrie v. Houston City St. Ry. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716; Thomas v. Lewis, 89 Va. 1, 15 S. E. 389, 37 S. E. 848; Talbot v. Silver Bow County, 139 U. S. 438, 11 S. E. 594, 35 L. Ed. 210; Lau Ow Bew v. United States, 144 U. S. 47, 12 S. C. Rep. 517, 36 L. Ed. 340.

²⁶ Franklin County v. Layman, 43 Ill. App. 163; S. C. affirmed, 145 Ill. 138, 33 N. E. 1094; Conn. v. Board of Com'rs, 151 Ind. 517, 51 N. E. 1062; Groff v. Miller, 20 App. Cas. (D. C.) 353; Ott v. Young, 78 Miss. 487, 29 So. 520; Bryant v. Russell, 127 Mo. 422, 30 S. W. 107; Schawacker v. McLaughlin, 139 Mo. 333, 40 S. W. 935; Spencer v. Myers, 150 N. Y. 269, 44 N. E. 942, 55 Am. St. Rep. 675, 34 L. R. A. 175.

²⁷ Pool v. Simmons, 134 Cal. 621, 66 Pac. 872; Monat Lumber Co. v. Gilpin, 4 Colo. App. 534, 36 Pac. 892; State v. McLain, 49 Mo. App. 398; Kerney v. Barber Asphalt Pav. Co., 86 Mo. App. 573; People v. Prillen, 173 N. Y. 67, 65 N. E. 947; Hawaii v. Mankichi, 190 U. S. 197.

did not so state, the mortgage should be *absolutely void*. It was held that, considering the language of the act, the evil to be remedied and the object to be attained, the mortgage was void only in case of assignment and not as between the original parties, though the letter of the statute made it void as to all parties.²⁸ But it must be a clear case when what is within the letter is excluded as not within the spirit or intent of the statute.²⁹

§ 380. Some effect, if possible, to be given every word, clause and sentence.—“It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.”³⁰ Statutes should

²⁸ Hogan v. Akin, 181 Ill. 448, 55 N. E. 137.

²⁹ State v. Phoenix Ins. Co., 92 Tenn. 420, 21 S. W. 893.

³⁰ State v. Bentley, 39 Neb. 353, 55 N. W. 962. Many cases are to the same effect. Brace v. Sohner, 1 Alaska, 361; San Diego v. Grannis, 77 Cal. 511, 19 Pac. 875; County Court v. Schwarz, 13 Colo. 291, 22 Pac. 783; Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; Crozer v. People, 206 Ill. 464, 469; Root v. Sinnock, 24 Ill. App. 537; Sherman v. Des Moines, 100 Iowa, 88, 69 N. W. 410; State v. Mitchell, 50 Kan. 289, 33 Pac. 104; Harrison v. Masonic Mut. Benefit Soc., 61 Kan. 134, 59 Pac. 266; Lemonius v. Mayor, 71 Miss. 514, 14 So. 33; Heman v. McNamara, 77 Mo. App. 1; State v. Maggard, 80 Mo. App. 286; State v. Cave, 20 Mont. 463, 52 Pac. 200; State v. District Court, 26 Mont. 396, 68 Pac. 570; Matter of New York & B. Bridge, 72 N. Y. 527; Gusthal v. Strong, 23 App. Div. 315, 48 N. Y. S. 652; Starok v. Insurance Co., 7 Pa. Co. Ct. 511; Cray v. Port Ar-

thur Channel & Dock Co., 92 Tex. 275, 47 S. W. 967; Morrison v. Carey-Lombard Co., 9 Utah, 70, 33 Pac. 238; Carey-Lombard Co. v. Partridge, 10 Utah, 322, 37 Pac. 573; Page v. Utah Commission, 11 Utah, 119, 39 Pac. 499; Smith v. Bryan, 100 Va. 199, 40 S. E. 652; Bank of Bramwell v. Mercer Co. Ct., 36 W. Va. 341, 15 S. E. 78; Baxter v. Wade, 39 W. Va. 281, 19 S. E. 404; Argand Refining Co. v. Quinn, 39 W. Va. 535, 20 S. E. 576; Petri v. Commercial Nat. Bank, 142 U. S. 644, 12 S. C. Rep. 325, 35 L. Ed. 1144; In re Matthews, 109 Fed. 603; Mayor v. Howard, 6 H. & J. 383; Martin v. O'Brien, 34 Miss. 21; United States v. Hawkins, 4 Martin (N. S.), 317; City Bank v. Huie, 1 Rob. (La.) 236; People v. Burns, 5 Mich. 114; Potter v. Safford, 50 id. 46, 14 N. W. 694; Reithmiller v. People, 44 Mich. 280, 284, 6 N. W. 280; Brooks v. Mobile School Commissioners, 31 Ala. 227; Kelley's Heirs v. McGuire, 15 Ark. 555; Dunlap, Ex parte, 71 Ala. 93; Attorney-General v. Detroit, etc. R. R. Co., 2 Mich. 138; Aldridge v. Mardoff, 32 Tex.

be so construed that effect may be given to all of their provisions, so that no part will be inoperative or superfluous, void or insignificant,³¹ and so that one section will not destroy another.³² An act in relation to the supreme court of Kansas provided in section 8 for the bond and oath of the clerk of the court and ended with these words: "and his fees shall be the same as the clerks of the district courts." Later section 8 was amended "to read as follows," thereby repealing the old section. The new section re-enacted the provisions as to bond and oath, omitted the provision as to fees above quoted and substituted the following words which ended the section: "and the clerk shall receive, *in addition to the fees already prescribed*, such *per diem* during the term as may be allowed by said court." The question was whether the clerk was still entitled to the fees allowed to clerks of the district courts. The supreme court held in the affirmative and said: "The language of the act of 1869, 'in addition to the fees already prescribed,' must be allowed a meaning. These words cannot be expunged, as it were, from the statute. They have the effect to continue the right to charge the fees which had theretofore been prescribed by statute, although the statute which had theretofore prescribed them had been repealed. The statute of 1869 continues that of 1868 by reference to it."³³ An act to prohibit the practice of blacklisting and the coercing and

204; *Green v. Cheek*, 5 Ind. 105; *Wilson v. Biscoe*, 11 Ark. 44; *Gates v. Salmon*, 35 Cal. 576; *State v. Turnpike Co.*, 16 Ohio St. 308, 320; *Cearfoss v. State*, 42 Md. 406; *Brooks v. Hicks*, 20 Tex. 666; *Wilkinson v. Leland*, 2 Pet. 627, 662, 7 L. Ed. 542; *Taylor v. Palmer*, 31 Cal. 240; *Howard v. Mansfield*, 30 Wis. 75; *State ex rel. v. Commissioners, etc.*, 34 id. 162; *Commonwealth v. Intoxicating Liquors*, 108 Mass. 19; *Whipple v. Judge*, 26 Mich. 343.

³¹ *Illinois Cent. R. R. Co. v. Chi-*

cago, 138 Ill. 453, 28 N. E. 740; *Vermont L. & T. Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318; *Morrison v. Carey-Lombard Co.*, 9 Utah, 70, 33 Pac. 238; *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652; *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484.

³² *Bernier v. Bernier*, 147 U. S. 242, 13 S. C. Rep. 244, 37 L. Ed. 152; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 12 S. C. Rep. 325, 35 L. Ed. 1144.

³³ *Harrison v. Masonic Mut. Ben. Soc.*, 61 Kan. 134, 59 Pac. 266.

influencing of employees by their employers provided in section 2 that "no company, corporation or partnership" shall permit its agents to blacklist any discharged employee, or prevent or hinder such employee or any employee who has voluntarily left "such company's or person's service from obtaining employment from any other person or company." It was held that effect must be given to the word "person's" in the last quotation, and that to do so it must be read into the first part of the section thus, "no person, company, corporation or partnership," etc., and the statute was so construed.³⁴ A Texas statute giving authority to construct a channel "across, along, through or upon any of the waters of the bays" within this state, was held to authorize the construction of a channel on the land by or near the water, because in no other way could effect be given to the word *along*.³⁵ Some additional illustrations will be found cited in the margin.³⁶

§ 381. Words enlarged or restricted to carry out intent.—Numerous cases have already been cited to the general proposition that the words of a statute will be enlarged or restrained in their meaning so as to carry out the manifest intent of the legislature.³⁷ Some illustrations of the general rule are here added. An act of congress empowered the president to authorize the cutting and removal, by Indians from their reservations, of dead timber, standing or fallen. It was held that the words "dead timber" would include trees not entirely dead, but so injured that a prudent owner would remove them from his own land.³⁸ A

³⁴ *State v. Justus*, 85 Minn. 279, 88 N. W. 759, 89 Am. St. Rep. 550. *Townes*, 93 Ky. 597, 20 S. W. 912; *Rose v. Wortham*, 95 Tenn. 505, 32

³⁵ *Crary v. Port Arthur Channel & Dock Co.*, 92 Tex. 275, 47 S. W. 967. *S. W. 458*, 30 L. R. A. 609; *Manhardt v. Illinois Staats Zeitung Co.*, 90

³⁶ *Groff v. Miller*, 20 App. Cas. (D. C.) 353; *Heman v. McNamara*, 77 Mo. App. 1; *State v. Maggard*, 80 Mo. App. 286; *State v. Cave*, 20 Ill. App. 315; *East Tenn., Va. & Ga. Ry. Co. v. Mahoney*, 89 Tenn. 311, 15 S. W. 652.

³⁷ *United States v. Pine River Logging & Imp. Co.*, 89 Fed. 907, 32 C. C. A. 406.

³⁸ *Ante*, § 376; also *Greenville v.*

statute imposing a tax upon every sewing-machine company selling or dealing in sewing machines in the state was held to include an individual engaged in the same business.³⁹ An act for the protection and relief of railroad employees applied in terms only to railroad corporations owning or operating a railroad wholly or partly within the state. It was held to apply to the receiver of a railroad.⁴⁰ The charter of a lumbering association provided for a small charge on every one thousand feet of logs that came into its boom, to be deposited in a savings bank and used, first, to discharge certain obligations to the Penobscot Boom Company, and, second, "to pay any other debt of the association." The balance was to be distributed to those who paid it. On a petition for the distribution of the fund at the expiration of the charter it appeared that there were no obligations to the Penobscot Boom Company and no *debts*, unless certain claims against the association for damages by reason of its alleged negligence, for which suits were pending against the company, were debts within the charter. It was held, in view of the whole charter, that these claims were debts within the intent of the law.⁴¹ A statute forbade the sale,

³⁹ *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497.

⁴⁰ *Pierce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280.

⁴¹ In *Re Penobscot Lumbering Ass'n*, 93 Me. 391, 45 Atl. 290, the court says: "The legal construction of the word 'debt,' as found in statutes, has been the subject of much discussion in the decisions, but a review of them would be of little service here. The construction of this statute must fall within the general rules for the construction of all statutes, and the chief of these rules is to give effect to the legislative intent, as it may be ascertained from all the language used. And within that rule it will be our duty to give the word 'debt'

such a construction in this case as will carry out what we think is the evident design of petitioners' charter. The obvious intention of a statute, and not its literal import, is to govern. The meaning of the statute is to be ascertained though it seems to conflict with the words. This is only saying that a statute must be construed according to the obvious legislative intent shown by all of its provisions taken together, and that the special meaning of some words may be enlarged or modified by the general meaning of all the words as a whole. The meaning of the word as used in the charter may be extended beyond the technical and limited significance of the word itself." p. 395.

without license, of "whiskey, brandy, rum, gin, wine, ale, porter, beer and all other fermented and distilled liquors." The general words were held to apply only to such liquors as were ordinarily used as intoxicants and not to such as were used for medicinal or other purposes, and certain malt extracts were held not to be within the statute.⁴² The national banking act in terms gives the power of taxation to states only, but it was held that territories were within the intent of the act, and that, "while the word state is often used in contradistinction to territory, yet in its general public sense, and as sometimes used in the statutes and proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the territories, as well as those political communities known as states of the Union."⁴³ But words cannot be enlarged or restrained unless some ground for it can be found in the statute.⁴⁴

§ 382. Words deemed inserted to carry out intent.— "The intention of the legislature being ascertained with reasonable certainty, words may be supplied in the statute so as to give it effect and avoid any repugnancy or inconsistency with such intention."⁴⁵ In the case referred to a statute provided for the organization of a borough within a township and for a division of property and liabilities between the borough and township, and that such division should not be valid unless approved "by a majority of the said township" and by the mayor and council of the borough. The affairs of the township were managed by a township committee, and all other acts, on the part of the township, in reference to the division, were to be done by that committee. The court supplied the word *committee* after *township* in the clause quoted and so construed the act to mean that the division should be approved by the township com-

⁴² Mackall v. District of Columbia, 16 App. Cas. (D. C.) 301.

⁴³ Talbot v. Silver Bow County, 139 U. S. 438, 444, 11 S. C. Rep. 594, 35 L. Ed. 210.

⁴⁴ Fowler v. Wood, 78 Hun, 304, 307, 28 N. Y. S. 976.

⁴⁵ Orvil v. Woodcliff, 64 N. J. L. 286, 291, 45 Atl. 686, reversing 61 N. J. L. 107, 38 Atl. 685.

mittee. A statute required the directors of a corporation, within thirty days after the stock was paid in full, to make a certificate of the amount of the capital paid in and to "record the same in the office of the secretary of state, and of the county in which the principal business office of such corporation is located." The act thus did not specify in what office of the county the certificate should be recorded. But the county clerk's office was the usual place for recording such papers and was the only office common to all the counties where such records were kept. It was held that the county clerk's office was intended and the words "of the county clerk" were in effect read into the statute.⁴⁶ Additional cases are referred to in the margin.⁴⁷ But the practice of reading words into a statute is one to be exercised with caution, and should only be indulged when the omission is palpable and the omitted word clearly indicated by the context.⁴⁸ An act was entitled "An act to create and organize the county of Clearwater and define the boundaries of Shoshone, Idaho and Nez Perces counties." Section 1 provided "that all that portion of the state of Idaho included within the following boundaries," then described certain territory and there stopped. Sections 2 and 3 provided that that portion of Shoshone and Nez Perces counties "not embraced within the county of Clearwater as described in section 1 of this act" shall hereafter constitute the counties of Shoshone and Nez Perces. There was apparently

⁴⁶ Jones v. Mail & Express Pub. Co., 80 Hun, 368, 30 N. Y. S. 335.

⁴⁷ Morris v. People, 4 Colo. App. 136, 35 Pac. 188; Peoria & Pekin Union R. R. Co. v. People, 144 Ill. 458, 33 N. E. 873; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Clark v. Kent, 80 Ill. App. 128; S. C. affirmed, Kent v. Clark, 181 Ill. 237, 54 N. E. 967; Gustavel v. State, 153 Ind. 613, 54 N. E. 123; Landrum v. Flannigan, 60 Kan. 436, 56 Pac. 753; Commonwealth v. Barney, 24 Ky.

L. R. 2352, 74 S. W. 181; Loper v. State, 82 Minn. 71, 84 N. W. 650; Earhart v. State, 67 Miss. 325, 7 So. 347; People v. Wells, 52 App. Div. 583, 65 N. Y. S. 319; Territory v. Clark, 2 Okl. 82, 35 Pac. 882; Hutchings v. Commercial Bank, 91 Va. 68, 20 S. E. 950; United States v. Burr, 159 U. S. 78, 15 S. C. Rep. 1002, 40 L. Ed. 82.

⁴⁸ See Matter of McLarney, 90 Hun, 361, 35 N. Y. S. 893.

omitted from section 1, following the description, words of this import, "shall constitute and be the county of Clearwater." But the court held that a county could not be created by implication and said that: "While courts do, in order to carry out the will of the legislature, expressed in an imperfect way, interpolate punctuation or words evidently intended to be used, yet, when such interpolation comprises the real substance of the act—in this instance, words creating a county—the court is not authorized to make such interpolation."⁴⁹ Where the omission is not plainly indicated and the statute as written is not incongruous or unintelligible and leads to no absurd results, the court is not justified in making an interpolation.⁵⁰

§ 383. One word substituted for another.—The constitution of Illinois provides for the division of counties into not more than three classes according to population, for the purpose of regulating the compensation of county officers. In 1872 an act was passed concerning fees and salaries, which by section 13 divided counties into three classes; first, those having not exceeding 20,000 population; second, those having 20,000 and not exceeding 70,000; third, those exceeding 70,000. Section 33 provided for the fees of the clerk of the circuit court "in counties having a population exceeding 70,000." In 1883 section 13 was amended so as to make the classes (1) not exceeding 25,000, (2) 25,000 and not exceeding 100,000, and (3) exceeding 100,000. Section 33 remained unchanged until 1893, when it was amended and re-enacted so as to change the fees but continuing the words, "in counties having a population ex-

⁴⁹ *Holmberg v. Jones*, 7 Idaho, 752, 65 Pac. 563.

⁵⁰ *Johnson v. Barham*, 94 Va. 305, 38 S. E. 136. The court says: "It is safer in a case which admits of doubt, when the court finds itself at all involved in conjecture as to what was the legislative intent, that the particular object which

may reasonably be supposed to have influenced the legislature in the particular case should fail of consummation than that courts should too readily yield to a supposed necessity, and exercise a power so delicate, and so easily abused, as that of adding to or taking from the words of the statute." p. 310.

ceeding 70,000." This amendment was claimed to be void because it made a fourth class of counties in violation of the constitution. Section 33 was preceded in the original statute by a sub-heading as follows: "Fees and compensation of clerks of courts of record, except in probate matters, in counties of the third class." It was held, considering the sub-title and the whole act, that section 33 was intended to apply to counties of the third class and that the words "one hundred thousand" should be substituted for the words "seventy thousand" in the section.⁵¹ The court says: "The title should have its due share of consideration in determining the intention of the legislature, and clearly shows, when taken in connection with the clause hereinafter referred to, that the legislature made a mistake, when it passed the amendment of 1893, in not substituting the words 'one hundred' for and in place of the word 'seventy,' so that the first clause in the section should have read: 'in counties having a population exceeding one hundred thousand inhabitants.' . . . It is manifest that the thing within the letter, to wit, 'seventy thousand,' is not within the statute because not within the intention, while the thing within the intention, to wit, 'one hundred thousand,' is within the statute, though not within the letter." An act to extend the corporate powers of the town of Dwight provided that the boundaries should include the south half of section 4 and the north half of section 9, in township thirty north, range nine (9) east, of the third principal meridian. The town of Dwight was located in township thirty north, range seven (7) east. It was held that the legislature did not intend to add territory twelve miles distant and in another county, and range seven was deemed substituted for range nine in the act.⁵² An act gave an appeal as provided in sections 49 to 51 inclusive of a certain statute. The court by a comparison of different statutes determined that the intent was plain to refer to sections 48

⁵¹ *People v. Gaultier*, 149 Ill. 39,
36 N. E. 576.

⁵² *Indiana, Ill. & Iowa R. R. Co.*
v. People, 154 Ill. 558, 39 N. E. 133.

to 51 and the statute was so construed, thus substituting 48 for 49.⁵³ The last section of a limitation act provided that "this section shall not be construed so as to affect any rights or liabilities, or any cause of action that may have accrued before this act shall take effect." It was held that the words "this section" should be construed as meaning "this act."⁵⁴ A Colorado statute provided that from and after the passage of the act all corporations for pecuniary gain organized under chapter 19 of the general laws should pay to the secretary of state, "upon the *issuing* the certificate, as provided in said chapter," certain specified fees. There was no provision for the *issuing* of certificates by the secretary of state, but certificates were required to be filed with him. It was held that the word "issuing" should be read "filing," in the above statute.⁵⁵ The word "county" was read "city,"⁵⁶ the word "plaintiff" was read "defendant,"⁵⁷ and the word "river" was read "ridge"⁵⁸ in the respective cases cited below. And generally wherever one word has been erroneously used for another, and the context affords the means of correction, the proper word will be deemed to be substituted.⁵⁹

§ 384. Words disregarded or eliminated.—Where a word or phrase in a statute would make the clause in which it occurs unintelligible, the word may be eliminated and the clause read without it.⁶⁰ It would be mischievous to at-

⁵³ Gray v. County Com'rs, 83 Me. 429, 22 Atl. 376.

⁵⁴ Dickson v. C., B. & Q. R. R. Co., 77 Ill. 331; Van Campe v. Chicago, 140 Ill. 361, 29 N. E. 892.

⁵⁵ Edwards v. Denver & R. G. R. R. Co., 13 Colo. 59, 21 Pac. 1011.

⁵⁶ Lancaster County v. Frey, 128 Pa. St. 593, 18 Atl. 478; Lancaster County v. Lancaster City, 160 Pa. St. 411, 28 Atl. 854.

⁵⁷ Hooper v. Birchfield, 115 Ala. 226, 22 So. 68.

⁵⁸ Rabun County v. Habersham County, 79 Ga. 248, 5 S. E. 198.

⁵⁹ Baca v. Bernalillo County Com'rs, 10 N. M. 438, — Pac. —; White v. Rio Grande Western Ry. Co., 25 Utah, 346, 71 Pac. 593.

⁶⁰ Stone v. Yeovil, L. R. 1 C. P. Div. 691; Bingham v. Birmingham, 103 Mo. 345, 15 S. W. 533; McCormick v. West Duluth, 47 Minn. 272, 50 N. W. 128; State v. Timothy, 147 Mo. 532, 49 S. W. 499; People v. Hilliard, 85 App. Div. 507, 83 N. Y. S. 204.

tempt to wrest such words from their proper and legal meaning merely because they are superfluous.⁶¹ The Greater New York charter was to take effect on the first day of January, 1898, with a proviso "that when, by the terms of this act, an election is provided or required to be held, or other act done or forbidden prior to January 1, 1898, then as to such election and such acts, this act shall take effect from and after its passage," etc. Section 73 provided that "after the approval of this act no franchise or right to use the streets, avenues, parkways or highways of the city shall be granted by the *municipal assembly* to any person or corporation for a longer period than twenty-five years." The municipal assembly could not come into being under the act until January 1, 1898, and, according to its strict terms, section 73 could not operate until the municipal assembly came into being. But it was held that the intent of the act was to prohibit such grants within the territory to be embraced under the charter from the passage of the act and the words "by the municipal assembly" in section 73 were disregarded.⁶² A statute of Illinois provided that any woman of the age of twenty-one years or upwards, belonging to either of the classes mentioned in article seven of the constitution of the state, might vote for school officers. The three classes thus incorporated into the act were, (1) those who were electors in the state on April 1, 1848, (2) those naturalized prior to January 1, 1870, and (3) male citizens of the United States, above the age of twenty-one years. Literally the act gave women the right to vote provided they were *male* citizens. It was held that the word "male" should be rejected in construing the statute.⁶³ In another

⁶¹ Hough v. Windus, L. R. 12 Q. B. Div. 229.

⁶² Gusthal v. Strong, 23 App. Div. 315, 48 N. Y. S. 652.

⁶³ People v. English, 139 Ill. 622, 29 N. E. 678. The court says: "A statute is to be interpreted according to its true intent and purpose,

and its strict letter must be made to yield to the obvious intent.

Words which are meaningless or inconsistent with the intention otherwise plainly expressed in the act may be rejected as redundant or surplusage. Here the word 'male,' read into the statute from

Illinois case the word "that" was read out of a statute, the court saying: "Where a literal reading of a statute leads to an absurdity, plainly not intended, the courts will put such a construction upon the language used as corresponds with the plain meaning and intent of the legislature, and to effect that purpose will strike out words which are clearly superfluous."⁶⁴ Where a word is evidently an interpolation, having no relation to the body of the section and being without sensible meaning, it should be disregarded.⁶⁵ But when a statute is plain as written, the courts cannot eliminate a word.⁶⁶

§ 385. **Implied exceptions to general language.**—The general terms of a statute are subject to implied exceptions founded on the rules of public policy, and the maxims of natural justice, so as to avoid absurd and unjust consequences.⁶⁷ Where a donee in a will murdered the testator

the constitutional provision referred to therein, is repugnant to the language of the statute both preceding and following the part where such reference is made, and is wholly inconsistent with the entire scope and manifest intent of the act."

⁶⁴ *Gage v. Chicago*, 201 Ill. 93, 66 N. E. 324.

⁶⁵ *Paxton & H. Irr. C. & L. Co. v. Farmers' & M. Irr. & L. Co.* 45 Neb. 884, 64 N. W. 343, 50 Am. St. Rep. 585, 29 L. R. A. 853.

⁶⁶ *Beatty v. Richardson*, 56 S. C. 173, 34 S. E. 73, 46 L. R. A. 576.

⁶⁷ *State v. Rollins*, 80 Minn. 216, 83 N. W. 141; *Moses v. United States*, 16 App. Cas. (D. C.) 428, 50 L. R. A. 532; *South Carolina & Ga. R. R. Co. v. Dietzen*, 101 Ga. 730, 29 S. E. 292; *Mantonya v. Emerich Outfitting Co.*, 172 Ill. 92, 49 N. E. 721; *Pease v. L. Fish Furn. Co.*, 70 Ill. App. 138; *S. C. affirmed*, 176 Ill. 220, 52 N. E.

932; *State v. Sears*, 115 Iowa, 28, 87 N. W. 735; *Adkinson v. Randle*, 93 Ky. 310, 20 S. W. 199; *Lyon v. Denison*, 80 Mich. 371, 45 N. W. 358, 8 L. R. A. 358; *Thayer v. Grand Rapids*, 82 Mich. 298, 46 N. W. 228; *People v. Cook*, 96 Mich. 368, 55 N. W. 980; *State v. McMahon*, 65 Minn. 453, 68 N. W. 77; *State v. Barge*, 82 Minn. 256, 84 N. W. 911, 1116, 53 L. R. A. 428; *State v. Jones*, 102 Mo. 305, 14 S. W. 946, 15 S. W. 556; *State v. Marshall*, 48 Mo. App. 560; *Richter v. Merrill*, 84 Mo. App. 150; *People v. Prillen*, 173 N. Y. 67, 65 N. E. 947; *State v. Beck*, 21 R. I. 288, 43 Atl. 366, 45 L. R. A. 269; *Railroad Co. v. Hughes*, 94 Tenn. 450, 29 S. W. 723; *Mobile & Ohio R. R. Co. v. Thompson*, 101 Tenn. 197, 47 S. W. 151; *Wise v. Morgan*, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548; *Barkley v. State*, 28 Tex. Ct. App. 99, 12 S. W. 495; *McIver v. State*, 34 Tex. Crim. Rep. 214, 29 S. W. 1083.

in order to obtain his property under the will, it was held by the New York court of appeals that he could not take, though literally within the terms of the statute. The court says: "It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it. It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers. . . . Besides, all laws as well as contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered by all civilized countries, and have nowhere been superseded by statutes."⁶⁸ An act of congress passed in 1893 required all Chinese laborers then lawfully in the United States to procure certificates of residence within six months under penalty of deportation. The act was held not to apply to a Chinese woman who, after the six months had expired, be-

⁶⁸ *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188, 12 Am. St. Rep. 819, 5 L. R. A. 340. A similar case arose in Nebraska, where a father murdered his daughter in order to possess himself of her estate. The supreme court first held that the father took nothing by his crime, but on rehearing reversed its decis-

ion, holding that the statute was plain and the court could not read an exception into it. *Shellenberger v. Ranson*, 31 Neb. 61, 47 N. W. 700, 28 Am. St. Rep. 500, 10 L. R. A. 810; on rehearing, 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 564. See also *Owens v. Owens*, 100 N. C. 240.

came the wife of an American citizen.⁶⁹ The court said that it was always presumed that the legislature intended exceptions to general language which would avoid injustice and absurdity. Another act of congress made it unlawful for any person or corporation to prepay the transportation or encourage the importation of any alien or foreigner into the United States under a contract to perform labor or service of any kind in this country. The statute expressly excepted professional actors, artists, lecturers, singers and domestic servants. The question arose whether a church procuring a rector from England violated the statute. The court held that, notwithstanding the general words of the statute and the express exceptions which did not include the contract in question, such professional services were not within the intent of the statute.⁷⁰ The code of New York gave the next of kin of a testator the right to bring a suit to contest his will. It was held that such next of kin could not bring suit unless they showed that they would have some interest in the property if the will was set aside.⁷¹ A statute required that on an appeal from a justice of the peace the appellant should give bond in double the amount of the judgment appealed from. It was held not to apply to an appeal by the party in whose favor a judgment was rendered.⁷² A statute requiring each voter to retire separately to a compartment and there mark his ballot unaided was held not to apply to an illiterate person.⁷³ Further illustrations will be found in the margin.⁷⁴ But courts cannot read exceptions into statutes merely because, in the opinion of the court, such exceptions ought to be made, or because such

⁶⁹ *Tsoi Sim v. United States*, 116 Fed. 920, 54 C. C. A. 154.

⁷⁰ *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 S. C. Rep. 511, 36 L. Ed. 226.

⁷¹ *Miller v. Maujer*, 82 App. Div. 419, 81 N. Y. S. 575.

⁷² *Edwards v. Morton*, 92 Tex. 152, 46 S. W. 792.

⁷³ *Rogers v. Jacobs*, 88 Ky. 502, 11 S. W. 513.

⁷⁴ *Fox v. Hale & N. Silver Min. Co.*, 97 Cal. 353, 32 Pac. 446; *East Tenn., Va. & Ga. Ry. Co. v. Mahoney*, 89 Tenn. 311, 15 S. W. 652; *Lau Ow Bew v. United States*, 144 U. S. 47, 12 S. C. Rep. 517, 36 L. Ed. 340.

exceptions would be just and reasonable or wise and politic.⁷⁵ As a general rule the courts will not engraft exceptions upon the plain words of a statute,⁷⁶ and only do so to avoid a result so unreasonable or absurd as to force the conviction upon the mind that the legislature could not have intended such result.⁷⁷

§ 386. **Transposition of words and phrases.**—Words, phrases and sentences may be transposed when necessary to give effect to all the words of a statute and to carry out the manifest intent.⁷⁹ An act read as follows: "All companies, after having received three annual premiums on any policy issued on the life of any person in this state, are estopped from defending upon any other ground than fraud *against any claim arising upon such policy* by reason of any errors, omissions or misstatements of the assured in any application by such assured on which the policy was issued, except as to age." It was held that the statute was meaningless as written and that the words in italics should be transferred and read as following the word "defending."⁸⁰

§ 387. **Particular and general intent.**—Where there are two provisions in a statute, one of which is general and designed to apply to cases generally, and the other is par-

⁷⁵ *Railway Co. v. B'Shears*, 59 Ark. 237, 27 S. W. 2; *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26; *United States v. Goldenberg*, 168 U. S. 95, 18 S. C. Rep. 3, 42 L. Ed. 394.

⁷⁶ *In re Shankwiler's Assignment*, 104 Iowa, 67, 73 N. W. 479; *Barker v. Hebbard*, 81 Mich. 267, 45 N. W. 964; *Davenport v. Hannibal*, 120 Mo. 150, 25 S. W. 364; *Randall v. Richmond & D. R. R. Co.*, 104 N. C. 410, 414, 10 S. E. 691; *Gilbert v. Dutruit*, 91 Wis. 661, 65 N. W. 511; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 S. C. Rep. 540, 41 L. Ed. 1007; *Morgan v. Des Moines*, 60 Fed. 208, 8 C. C.

A. 569, 19 U. S. App. 593; *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49; *People v. Bray*, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158.

⁷⁷ *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26.

⁷⁹ *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779; *Cunningham v. State*, 2 Speers, 246; *Canal Com'rs v. Sanitary District*, 184 Ill. 597, 56 N. E. 953; *Criswell v. Mont. Cent. Ry. Co.*, 17 Mont. 189, 42 Pac. 767; *State v. Turnpike Co.*, 16 Ohio St. 308; *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869.

⁸⁰ *Starck v. Insurance Co.*, 7 Pa. Ct. 511.

ticular and relates to only one case or subject within the scope of the general provision, then the particular provision must prevail; and, if both cannot apply, the particular provision will be treated as an exception to the general provision.⁸¹ But the rule that a particular provision prevails over a general one only applies where the two conflict.⁸²

§ 388. There can be no intent of a statute not expressed in its words.— While the object of all construction and the purpose of all rules of interpretation is to ascertain the legislative intent, and while, in construing a particular part of a statute, the whole act may be regarded and all other acts bearing on the subject, and all extraneous circumstances which the legislature may be supposed to have had in mind, may be properly taken into consideration, yet the intent which is finally arrived at must be an intent consistent with, and fairly expressed by, the words of the statute themselves. “A legislative intention not expressed in some appropriate manner has no legal existence.”⁸³ Interpretation has its limits, beyond which it cannot legitimately go, and it will not be carried to the extent of giving to a statute a meaning repugnant to its terms.⁸⁴ An act of congress provided for a bounty to our sailors for each person on board an enemy’s ship or vessel which was sunk or destroyed by any ship or vessel belonging to the United States, “of one hundred dollars if the enemy’s *vessel* was of inferior force, and of two hundred dollars if of equal or superior force.” In case of the battle of Manila our vessels

⁸¹ *Dahnke v. People*, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197; *People v. Hutchinson*, 172 Ill. 486, 50 N. E. 599; *Arnold v. Council Bluffs*, 85 Iowa, 441, 52 N. W. 347; *Hawes v. Fliegler*, 87 Minn. 319, 92 N. W. 223; *Musick v. Kansas City, etc. Ry. Co.*, 114 Mo. 309, 21 S. W. 491; *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 529; *Baxter v. Wade*, 39 W. Va. 281, 19 S. E. 404; *In re Rouse, Hazard &*

Co., 91 Fed. 96, 33 C. C. A. 356; *ante*, §§ 268, 346.

⁸² *Ex parte Ah Hoy*, 23 Ore. 89, 31 Pac. 220.

⁸³ *Lee Bros’ Furn. Co. v. Cram*, 63 Conn. 433, 438, 28 Atl. 540.

⁸⁴ *Brotherhood Acc. Co. v. Lineham*, 71 N. H. 7, 51 Atl. 266. And see *Board of Election Com’rs v. State*, 148 Ind. 675, 48 N. E. 226; *United States v. Chase*, 135 U. S. 255, 10 S. C. Rep. 756, 34 L. Ed. 117.

were of superior force to the enemy's vessels alone, but of inferior force to the enemy's vessels and shore batteries combined. In fact our vessels fought a superior force, and it was contended that our forces were entitled to the larger bounty within the spirit and reason of the act. But the supreme court held that the words of the act plainly limited the inquiry to the comparative force of the enemy's *vessels* alone, and that the court could not derive an intent from the act which could not be read from its words.⁸⁵ An act of Ohio in regard to the jurisdiction of the supreme court was amended so as greatly to abridge its jurisdiction as to the character of cases which might be reviewed and so as to take away a jurisdiction that had always been exercised by it. The claim was made that the change was too radical to have been intended, and that while the statute was admittedly plain as written, the old jurisdiction could be preserved by interpolating the word "and," and by transposing words and phrases and changing the punctuation, and that it was the duty of the court to so construe the act. The court held otherwise, and in its opinion says: "Coming to the act itself, it must be plain to every intelligent reader that with respect to the question we are considering there is no ambiguity or doubt as to the natural meaning of the words used. Taking it just as it comes to us from the hands of the law-making body, the import of the act is clear and explicit. To endeavor to make this plainer would be like an attempt to reason upon a sum in simple addition. Plainly, then, we are asked to import into the act a doubt as to its meaning and then resort to a change of phraseology, or punctuation, or to an addition of words, or to a rejection of classes of cases enumerated, in order to remove the doubt that we have thus created, a doubt based upon considerations and conjectures *aliunde*. This the court may not do. The province of construction is to arrive at the true sense of the language of the act, not to supply language to help

⁸⁵ Dewey v. United States, 178 U. S. 510, 20 S. C. Rep. 981, 44 L. Ed. 1170.

out a conjectured intent not to be gathered from the words used. The question is not so much what did the legislature intend to enact as what did it mean by what it did enact.”⁸⁶

The intent to be ascertained and enforced is the intent expressed in the words of the statute, read in the light of the constitution and the fundamental maxims of the common law, and not an intent based upon conjecture or derived from external considerations.⁸⁷ “While ambiguous and doubtful terms in legislative acts may and should be so interpreted by the courts as to carry out the intention of the body which enacted them when they fairly disclose that intention, yet it is the purpose which the act itself discloses, and that only, which may be thus enforced.”⁸⁸

§ 389 (247). Interpretation of words and phrases — General rules.— Primarily — that is, in the absence of anything in the context to the contrary — common or popular words are to be understood in a popular sense: common-law words according to their sense in the common law; and technical words, pertaining to any science, art or trade, in a technical sense.⁸⁹ It is a familiar rule of construction,

⁸⁶ *Slingluff v. Weaver*, 66 Ohio St. 621, 628, 64 N. E. 574.

⁸⁷ *Eureka v. Diaz*, 89 Cal. 467, 26 Pac. 961; *Appeal of Drawbaugh*, 3 App. Cas. (D. C.) 236; *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348; *Sheibler v. Mundinger*, 86 Tenn. 674, 9 S. W. 33; *State v. Manson*, 105 Tenn. 232, 58 S. W. 319.

⁸⁸ *Union Central Life Ins. Co. v. Champlin*, 116 Fed. 858, 54 C. C. A. 208. To same effect, *Johnson v. Southern Pac. Co.*, 117 Fed. 462, 54 C. C. A. 681.

⁸⁹ *Cull v. Austin*, L. R. 7 C. P. 234; *Lion Ins. Ass'n v. Tucker*, L. R. 12 Q. B. D. 186; *Schrieffer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481;

Green v. Weller, 32 Miss. 650; *Wetumpka v. Winter*, 29 Ala. 651; *Quigley v. Gorham*, 5 Cal. 418, 73 Am. Dec. 139; *Gross v. Fowler*, 21 Cal. 392; *Evans v. Stevens*, 4 T. R. 462; *Clark v. Utica*, 18 Barb. 451; *Morrall v. Sutton*, 1 Phil. 533; *Cruger v. Cruger*, 5 Barb. 225; *Jesson v. Wright*, 2 Bligh, 2; *Doe v. Harvey*, 4 B. & C. 610; *Abbott v. Middleton*, 7 H. L. 68; *State v. Clarksville, etc. Co.*, 2 Sneed, 88; *Palmer v. State*, 7 Cold. 82; *Engelking v. Von Wamel*, 26 Tex. 469; *Saltoun v. Advocate-General*, 3 Macq. 659; *Queen v. Castro*, L. R. 9 Q. B. 360; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *Martin v. Hunter*, 1 Wheat. 326, 4 L. Ed. 97;

alike dictated by authority and common sense, that common words are to be extended to all the objects which, in their usual acceptance, they describe or denote; and that technical terms are to be allowed their technical meaning and effect, unless in either case the context indicates that such construction would frustrate the real intention of the maker.⁹⁰ They should be construed according to the intent of the legislature which passed the act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the legislature.⁹¹ The court is at liberty to regard the state of the law at the time, and the facts which the preamble or recitals of the act prove to have been the existing circumstances at the time of its preparation.⁹² They should be construed with reference to their generally accepted meaning at the time of the passage of the act, and if re-enacted will be deemed to be adopted in their original sense.⁹³ The meaning of the words and phrases may be ascertained by reference to the context,⁹⁴ or to acts *in pari materia*.⁹⁵ In a recent case

Georgia v. Atkins, 1 Abb. (U. S.) 22, Fed. Cas. No. 5350; *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; *McCool v. Smith*, 1 Black, 459, 17 L. Ed. 218; *The Kate Heron*, 6 Sawyer, 106, Fed. Cas. No. 7619; *United States v. Jones*, 3 Wash. 209; *United States v. Magill*, 1 Wash. 463, Fed. Cas. No. 15,706; 4 Dall. 426; *Vincent*, Ex parte, 26 Ala. 145; *Allen's Appeal*, 99 Pa. St. 196, 44 Am. Rep. 101; *Adams v. Turrentine*, 8 Ired. L. 147; *Apple v. Apple*, 1 Head, 348; *Bestor v. Powell*, 7 Ill. 119; *Turnpike Co. v. State*, 1 Sneed, 474; *Reg. v. Archbishop of Canterbury*, 11 Q. B. 665.
⁹⁰ *De Veaux v. De Veaux*, 1 Strob. Eq. 288; *Hall*, Ex parte, 1 Pick. 261; *State v. Smith*, 5 Humph. 394;

Brocket v. R. R. Co., 14 Pa. St. 241, 53 Am. Rep. 534; *State v. Mayor*, etc., 35 N. J. L. 196.

⁹¹ *Sussex Peerage*, 11 Cl. & Fin. 85; *Hyde v. Hyde*, L. R. 1 P. & D. 134.

⁹² *Attorney-General v. Powis*, Kay, 186.

⁹³ *Dawson v. Dawson*, 23 Mo. App. 169; *St. Cross v. Howard*, 6 T. R. 338; *Smith v. Lindo*, 27 L. J. C. P. 200, 4 C. B. (N. S.) 395; *Wilson v. Knubley*, 7 East, 136; *Montrose Peerage*, 1 Macq. 406; *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355.

⁹⁴ *State v. Bentley*, 39 Neb. 353, 55 N. W. 962; *State v. District Court*, 26 Mont. 396, 68 Pac. 570.

⁹⁵ *South Park Com'rs v. First Nat. Bank*, 177 Ill. 234, 52 N. E. 365.

Lord Esher, M. R., lays down the following general rules for the construction of words and phrases: "Now when we have to consider the construction of words such as this occurring in acts of parliament we must treat the question thus: If the act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common and ordinary meaning of the words."⁹⁶

§ 390 (248). Words and phrases should be construed as they are generally understood.—As a general rule the words of a statute are to be taken in their ordinary and popular sense,⁹⁷ unless it plainly appears from the context

⁹⁶ *Unwin v. Hanson*, L. R. (1891) 2 Q. B. 115, 119.

⁹⁷ *Harrison v. State*, 102 Ala. 170, 15 So. 563; *People v. Reis*, 76 Cal. 269, 18 Pac. 309; *Hogg v. Lobb*, 7 Houst. 399, 32 Atl. 631; *Churchill v. Georgia R. R. & B. Co.*, 108 Ga. 265, 33 S. E. 972; *Youngs v. Youngs*, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313; *Emmons v. Lewistown*, 132 Ill. 380, 24 N. E. 58, 22 Am. St. Rep. 540, 8 L. R. A. 328; *Ramsay v. Whitbeck*, 81 Ill. App. 210; *Rothschild v. New York Life Ins. Co.*, 97 Ill. App. 517; *Enterprise v. Smith*, 62 Kan. 815, 62 Pac. 324; *Montgomery County Com'rs v. Glass*, 4 Kan. App. 286, 45 Pac. 935; *Talbott v. Fidelity & Casualty Co.*, 74 Md. 536, 22 Atl. 395; *Commonwealth v. Roberts*, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400; *Bacon v. Tax Commissioners*, 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524; *Peeler v.*

Peeler, 68 Miss. 141, 8 So. 392; *Henry & C. Co. v. Evans*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332; *Uteley v. Hill*, 155 Mo. 232, 55 S. W. 1091, 78 Am. St. Rep. 569, 49 L. R. A. 323; *Randol v. Garoutte*, 78 Mo. App. 609; *State v. White*, 96 Mo. App. 34, 69 S. W. 684; *State v. Johnson*, 20 Mont. 367, 51 Pac. 820; *State v. District Court*, 26 Mont. 396, 68 Pac. 570; *Baker v. Payne*, 22 Ore. 335, 29 Pac. 787; *Commonwealth v. Duff*, 7 Pa. Dist. Ct. 370; *State v. Mylod*, 20 R. I. 632, 40 Atl. 753; *Landauer v. Conklin*, 3 S. D. 462, 54 N. W. 322; *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262; *Sherwood v. Atlantic & D. Ry. Co.*, 94 Va. 291, 26 S. E. 943; *Columbia Water-Power Co. v. Columbia Elec. St. Ry. Co.*, 172 U. S. 475, 19 S. C. Rep. 247, 43 L. Ed. 521; *Treat v. White*, 181 U. S. 264, 21 S. C. Rep. 611, 45 L. Ed. 853.

or otherwise that they were used in a different sense.⁹⁸ In the construction of statutes a word which has two significations should ordinarily receive that meaning which is generally given to it in the community; but when this construction would contravene the manifest intention of the legislature, we must depart from this rule and give effect to the intention. A vehicle with four wheels drawn by oxen, suited to the ordinary purposes of husbandry, and employed in the same uses to which carts, in the common acceptation of the term, are appropriated, is protected from levy and sale by the statute which exempts "one horse or oxcart" from execution.⁹⁹ The words of a statute are to be read in their ordinary sense unless so construing them will lead to some incongruity or manifest absurdity.¹

§ 391. Meaning of words for the court—Sources of information.—The supreme court of Vermont in a recent case says: "If a word in a statute is of common import the court may understand it without further knowledge, but if the word is not of common use or has a technical meaning the judge may refer to persons who have knowledge on the subject, or consult documents or books of reference containing information thereon. If the terms are words of art and science, their meaning may be found by consulting experts in such art and science. In fact the trial judge may take such means as he deems advisable to inform himself upon the subject and enable him to give in his instructions to the jury the proper construction and definition of the words used in the statute."²

§ 392 (249). How general words construed.—General words should receive a general construction unless there

⁹⁸ *State v. District Court*, 26 Mont. Div. 27; *State v. Deshler*, 25 N. J. L. 177, 183.

396, 68 Pac. 570; *Sherwood v. Atlantic & D. Ry. Co.*, 94 Va. 291, 26 S. E. 943.

⁹⁹ *Favers v. Glass*, 22 Ala. 621, 58 Am. Dec. 272.

² *State v. Stevens*, 69 Vt. 411, 38 Atl. 80. The meaning of words is for the court. *Savannah, etc. Ry. Co. v. Daniels*, 90 Ga. 608, 17 S. E.

¹ *Collins v. Welch*, L. R. 5 C. P. 647, 20 L. R. A. 416.

is something in the statute to restrain them.³ When from the provisions of a statute it is clear that a restraint must be put upon the ordinary and literal signification of some word or expression, and it is uncertain from anything to be found in the act itself or in the circumstances judicially cognizable under which the provision was inserted, what the exact character and extent of that restriction is, it is the duty of the court to put no greater restriction than the nature of the provision and the subject-matter to which it relates necessarily impose.⁴

§ 393. **Technical words.**—Technical words relating to an art, science or trade, when used in a statute dealing with the subject-matter of such art, science or trade, are ordinarily to be taken in their technical sense and will be so construed, unless the context or other considerations plainly show a contrary intent.⁵ A statute provided that in mines “*where the coal is blasted off the solid,*” shot-firers must be employed to fire all shots after the employees and others have retired from the mine. The phrase in italics was well understood in the mining industry, and it was held that the statute was not void for uncertainty because these words were not defined and their meaning was not apparent from the face of the statute, but that they would be given the meaning which they had in the mining trade.⁶ So “it is a well settled canon of construction that where legal terms are used in a statute, they are to receive their technical meaning, unless the contrary plainly appears to have been the intent of the legislature.”⁷

³ Jones v. Jones, 18 Me. 308, 313, 36 Am. Dec. 723; Fowler v. Wood, 78 Hun, 304, 28 N. Y. S. 976.

⁴ Sullivan v. Mitcalf, L. R. 5 C. P. Div. 455; Lawrence County v. Meade County, 6 S. D. 528, 62 N. W. 131.

⁵ Bragg v. State, 134 Ala. 165, 32 So. 767; State v. Murlin, 137 Mo. 297, 38 S. W. 923; Clark v. Utica, 18

Barb. 451; State v. Stevens, 69 Vt. 411, 38 Atl. 80; Unwin v. Hanson, L. R. (1891) 2 Q. B. 115.

⁶ State v. Murlin, 137 Mo. 297, 38 S. W. 923.

⁷ Williams v. Dickenson, 28 Fla. 90, 99, 9 So. 847; Weindel v. Weindel, 126 Mo. 640, 29 S. W. 715; Ruckert v. Grand Ave. Ry. Co., 163 Mo. 260, 63 S. W. 814; Mitchell v.

§ 394 (250). Words having both popular and technical meaning.—Where a word having a technical as well as a popular meaning is used in the constitution or a statute the courts will accord to it its popular signification, unless the very nature of the subject indicates, or the context suggests, that it is used in its technical sense. Therefore the requirement that all bills shall be *read* on three several days is taken to mean actual readings.⁸ It would seem that popular words are to be construed in their strict and primary acceptation, unless it appears from the context that they were used in a different sense, or in their strict sense are incapable of being carried into effect.⁹ A statute provided that the probate court might appoint trustees when the use of property, real or personal, *descends* to a person for life or for years. It was held that the word “descends” was to be taken in its popular sense and included cases in which the use of property passed by will as well as by operation of law.¹⁰ If words taken in their technical sense will render a statute inoperative in whole or in part, they will be taken in their popular sense.¹¹ A statute for the regulation of railroads provided for *appeals* in all suits and cases brought under the act. It was held that the word “appeals” was to be taken in its popular sense, and that in its popular sense it included the removal of a cause from a court of inferior to a court of superior jurisdiction for the purpose of review and retrial and so included a writ of error.¹² A statute authorized the school board to suspend or expel any pupil guilty of gross *misdemeanor* or persistent disobedience. It was held that the word “misdemeanor” was not to be taken in its technical sense as denoting a criminal offense, but in

Blanchard, 72 Vt. 85, 47 Atl. 98;
Hawley v. Diller, 178 U. S. 476, 20
S. C. Rep. 986, 44 L. Ed. 1157.

⁸ Weill v. Kenfield, 54 Cal. 111;
People v. Tighe, 5 Hun, 25; Opinion
of Justices, 7 Mass. 523.

⁹ Mallan v. May, 13 M. & W. 511,
517.

¹⁰ Mitchell v. Blanchard, 72 Vt.
85, 47 Atl. 98.

¹¹ Id.

¹² State v. Jacksonville Terminal
Co., 41 Fla. 363, 27 So. 221.

its popular sense, as meaning *gross misconduct*.¹³ An act required electric light, water, gas and telephone companies to pay a license tax of one hundred dollars, with a proviso that "telephone lines of less than twenty-five miles in length shall pay a license tax of twenty-five dollars." It was shown that in the telephone business a "line" meant a line of poles and the wires suspended thereon without regard to the number of the wires. The wire to each subscriber was popularly called a "line," and the court construed the word in its popular sense, thus requiring the company in question to pay the larger tax.¹⁴ The court says: "While it is true, as a general rule, that popular words are to be construed in the popular sense, and technical words in a technical sense, when used in a statute, yet when a word has both a popular and a technical meaning, the court will give it effect according to the popular signification if it was so used by the legislature, and the context may be referred to in ascertaining the sense in which it was used."

§ 395 (254). Words in common use, and also having a technical sense, will, in acts intended for general operation and not dealing specially with the subject to which such words in their technical sense apply, be understood primarily in their popular sense, unless they are defined in the act or a contrary intention is otherwise manifest.¹⁵ Such words, however, will be understood in a technical sense when the act treats of the subject in relation to which such words are technically employed. Thus they are deemed technically used in legislation relating to courts and legal process. Thus, for example, the word "party" has a technical significance.¹⁶ So have the words "action," "suit"¹⁷ and "final

¹³ *Holman v. School District*, 77 Mich. 605, 43 N. W. 996, 6 L. R. A. 584. *v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481; *Green v. Weller*, 32 Miss. 650; *Parkinson v. State*, 14

¹⁴ *Southern Bell Tel. & Tel. Co. v. D'Alemberte*, 39 Fla. 25, 21 So. 570. Md. 184, 74 Am. Dec. 522.

¹⁵ *Cummings v. Coleman*, 7 Rich. Eq. 509, 62 Am. Dec. 402; *Schrieffer* *Merchants' Bank v. Cook*, 4 Pick. 405.

¹⁷ *Belfast v. Folger*, 71 Ma. 403;

judgment.”¹⁸ But by the cardinal rule that the intention of the law-makers is the essence of the law, when a technical word is obviously intended to have a broader than its strict technical sense, it will receive that interpretation. In *McBride's Appeal*¹⁹ the word “actions” in the provision in question was held to embrace “all civil proceedings of whatever kind,” as well as actions technically so called.²⁰ Technical words are sometimes used in statutes in a popular sense.²¹ In a penal statute, where it is sought to depart from the ordinary meaning of the words used, the intention of the legislature that these words should be used in a larger or more popular sense must clearly appear.²² Prohibitory statutes must not be interpreted on a principle of leniency; if anything done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is, within the true construction of the statute, the thing prohibited.²³ If a word is technical and used in a technical or conventional sense, it is to be construed accordingly; but its interpretation may then involve an inquiry into its technical meaning as matter of fact. Such laws are intended for practical application to men engaged in avocations in which the words have acquired a special meaning by usage. Such statutes are to be construed according to the conventional understanding of the terms used.²⁴

Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732; *Holmes v. Jennison*, 14 Pet. 540, 546, 10 L. Ed. 579, 618; *Calderwood v. Est. of Calderwood*, 38 Vt. 171.

¹⁸ *Snell v. Bridgewater, etc. Co.*, 24 Pick. 296, 299; *Western v. Charleston*, 2 Pet. 464, 7 L. Ed. 481; *Holmes v. Jennison*, 14 Pet. 540, 562, 10 L. Ed. 579, 618.

¹⁹ 72 Pa. St. 480. See *People v. May*, 3 Mich. 598.

²⁰ See *Coatsworth v. Barr*, 11 Mich. 199; *George v. Board of Education*, 33 Ga. 344; *King v. Pease*,

4 B. & Ad. 30; *State v. Clarksville & R. Turnpike Co.*, 2 Sneed, 88.

²¹ *People v. Tighe*, 5 Hun, 25, 27.

²² *Stephenson v. Higginson*, 3 H. L. Cas. 638.

²³ *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338.

²⁴ *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373; *Two Hundred Chests of Tea*, 9 Wheat. 430, 6 L. Ed. 128; *United States v. Sarchet, Gilpin*, 273, Fed. Cas. No. 16,224; *United States v. 112 Casks of Sugar*, 8 Pet. 277, 8 L. Ed. 944; *Curtis v. Martin*, 3 How. 106, 11 L. Ed. 516; *Lawrence*

"Acts of this nature," says Story, J.,²⁵ "are to be interpreted not according to the abstract propriety of the language, but according to the known usage of trade and business at home and abroad. If an article has one appellation abroad and another at home, not with one class of citizens merely, whether merchants, grocers or manufacturers, but with the community at large, who are buyers and sellers, doubtless our laws are to be interpreted according to that domestic sense; but where the foreign name is well known here and no different appellation exists in domestic use, we must presume that in commercial law the legislature used the word in the foreign sense. And so in reference to what rule ought to prevail where the article is known by one name among merchants and by another name among manufacturers or the community at large, interpreting the legislative meaning in the traffic act. Congress, under such circumstances, may, perhaps, be fairly presumed to use it in the more general and the more usual sense rather than in that which belongs to a single class of citizens."

§ 396 (251). A statute requiring that "all words and phrases shall be construed and understood according to the common and approved usage of language," etc., is only declaratory of a part of the common law on the subject, and will not preclude the operation of other common-law rules. The latter are of equal dignity and importance, and may be invoked to give effect to the legislative intent. A general statute prohibiting the carrying of concealed weapons was

v. Allen, 7 How. 785, 12 L. Ed. Fed. Cas. No. 12,034; "Gin," Webb 914; People v. Hulse, 3 Hill, 309; v. Knight, 2 Q. B. Div. 530; Arthur Lee v. Lincoln, 1 Story, 610, Fed. v. Morrison, 96 U. S. 108, 24 L. Ed. Cas. No. 8195; Attorney-General 764; United States v. Clement, v. Bailey, 1 Ex. 281; State v. Gup- Crabbe, 499, Fed. Cas. No. 14,815; ton, 8 Ired. 271; United States v. Commonwealth v. Giltinan, 64 Pa. Breed, 1 Sumn. 159, Fed. Cas. No. St. 100; Reg v. Wood, L. R. 4 Q. B. 14,638; Morse v. State, 6 Conn. 9; 559; Aerated Bread Co. v. Gregg, Whart. Com. on Am. L., § 604; The L. R. 8 Q. B. 355. Dunelm, L. R. 9 P. Div. 171; Roose-
²⁵ United States v. Breed, 1 Sumn. velt v. Maxwell, 3 Blatchf. 391, 159, Fed. Cas. No. 14,638.

qualified by a provision authorizing it when the person has reasonable grounds to believe his person, or the person of some of his family, is in *immediate* danger from violence or crime. As the literal sense of the word "immediate" would defeat the legislative purpose and render the privilege granted worthless, it was deemed inadvertently used, or used in some other than its ordinary sense; it was held that the provision authorized the carrying of such weapons when there was believed to be immediate danger of violence or crime at the hands of another, whenever that person is present, or "whenever or wherever he has reasonable ground to apprehend that he will encounter such person and be exposed to the apprehended danger."²⁶ Words in common use, and not technically employed, in a statute which is intended to be understood and practiced upon by the people, should be construed according to their popular meaning; that such was the intention of the legislature is the only intendment that ought to be adopted.²⁷

§ 397 (252). Use of the words "or" and "and."—The popular use of "or" and "and" is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context.²⁸

²⁶ Bailey v. Commonwealth, 11 Bush, 688.

²⁷ Strong v. Birchard, 5 Conn. 357, 361; Avery v. Pixley, 4 Mass. 460; Robinson v. Varnell, 16 Tex. 382.

²⁸ Metropolitan Board of Works v. Steed, L. R. 8 Q. B. Div. 447; Douglass v. Eyre, Gilpin, 148; State v. Myers, 10 Iowa, 448; State v. Brandt, 41 id. 593; State v. Smith, 46 id. 670; People v. Sweetser, 1 Dak. 295, 46 N. W. 452; State v. Custer, 65 N. C. 339; Barker v.

Esty, 19 Vt. 131; Sparrow v. Davidson College, 77 N. C. 35; Rigoney v. Neiman, 73 Pa. St. 330; Commonwealth v. Griffin, 105 Mass. 185; Foster v. Commonwealth, 8 W. & S. 77; Winterfield v. Stauss, 24 Wis. 394, 406; State v. Mitchell, 5 Ired. L. 350; State v. Miles, 2 Nott & McCord, 1; State v. McCoy, 2 Speers, 711; Green v. Wood, 7 Q. B. 178; Fowler v. Padget, 7 T. R. 509; Townsend v. Read, 10 C. B. (N. S.) 308; Waterhouse v. Keen, 4 B. & C.

In *People v. Rice*²⁹ it is said that the words "and" and "or" when used in a statute are convertible as the sense may require. The word "or" in a statute may have the meaning of "that is to say," "to wit," etc.³⁰

§ 398 (253). Words having a special sense in the common law.—Where a statute uses a word, which is well known and has a definite sense at common law or in the written law, without defining it, it will be presumed to be used in that sense and will be so construed, unless it clearly appears that it was not so intended.³¹ "Words having a

200; *Newland v. Marsh*, 19 Ill. 370; *Rolland v. Commonwealth*, 82 Pa. St. 306, 22 Am. Rep. 758; *Blemer v. People*, 76 Ill. 265; *State v. Pool*, 74 N. C. 402; *Murray v. Keyes*, 35 Pa. St. 384, 391; *Union Ins. Co. v. United States*, 6 Wall. 759, 18 L. Ed. 879; *Bollin v. Shiner*, 12 Pa. St. 205; *McConky v. Superior Court of Alameda Co.*, 56 Cal. 83; *United States v. Ten Cases of Shawls*, 2 Paine, 162, Fed. Cas. No. 16,448; *Clay v. Central R. R. & B. Co.*, 84 Ga. 345, 10 S. E. 967; *Sturgeon Bay Canal Co. v. Leatham*, 62 Ill. App. 386; S. C. affirmed, 164 Ill. 239, 45 N. E. 422; *Strohm v. People*, 60 Ill. App. 128; S. C. affirmed, 160 Ill. 582, 43 N. E. 622; *State v. Myers*, 146 Ind. 36, 44 N. E. 801; *Warren County v. Booth*, 81 Miss. 267, 32 So. 1000; *In re Weed*, 26 Mont. 241, 67 Pac. 308; *Standard Underground Cable Co. v. Attorney-General*, 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394; *People v. Rice*, 138 N. Y. 151, 33 N. E. 846; *Geiger v. Kobilka*, 26 Wash. 171, 66 Pac. 423, 90 Am. St. Rep. 733.

²⁹ 138 N. Y. 151, 156, 33 N. E. 846.

³⁰ *People v. Latham*, 203 Ill. 9, 67 N. E. 403; *People v. Grover*, 203 Ill.

24, 67 N. E. 165; *Arnold v. Cambridge*, 106 Mass. 353; *Wilbur v. Taunton*, 123 Mass. 522.

³¹ *Buckner v. Real Estate Bank*, 5 Ark. 536, 41 Am. Dec. 105; *Rives v. Guthrie*, 1 Jones' L. 88; *McCool v. Smith*, 1 Black, 459, 17 L. Ed. 218; *Hillhouse v. Chester*, 3 Day, 166, 3 Am. Dec. 265; *State v. Engle*, 21 N. J. L. 347; *Allen's Appeal*, 99 Pa. St. 196, 44 Am. Rep. 101; *Brocket v. Ohio, etc. R. R. Co.*, 14 Pa. St. 241, 243, 53 Am. Dec. 534; *Adams v. Turrentine*, 8 Ired. L. 147; *The Kate Heron*, 6 Sawyer, 106, Fed. Cas. No. 7619; *Apple v. Apple*, 1 Head, 348; *State v. Mace*, 5 Md. 337; *United State v. Magill*, 1 Wash. 463, Fed. Cas. No. 15,706; *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. 250; *English v. State*, 31 Fla. 340, 12 So. 689; *Kirchoff v. Union Mut. Life Ins. Co.*, 128 Ill. 199, 20 N. E. 808; *Meadowcroft v. Winnebago County*, 181 Ill. 504, 54 N. E. 949; *Board of Com'rs v. Bailey*, 122 Ind. 46, 23 N. E. 672; *Norfolk & W. R. Co. v. Prindle*, 82 Va. 122; *post*, § 453; *United States v. Trans-Mo. Freight Ass'n*, 58 Fed. 58, 7 C. C. A. 15, 19 U. S. App. 36.

precise and well-settled meaning in the jurisprudence of a country are to be understood in the same sense when used in statutes, unless a different meaning is unmistakably intended."³²

§ 399 (255). *Statutory use of words.*—A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears.³³ The intention is obvious to use the word *marry* in a different sense from that implied in the word *married* in the provision fixing a penalty against a person who "being married" should "marry" again.³⁴ Where words have been long used in a technical sense and have been judicially construed to have a certain meaning, and have been adopted by the legislature as having a certain meaning prior to a particular statute in which they are used, the rule of construction requires that the words used in such statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words.³⁵ And if the legislature use words which have received a judicial interpretation they

³² *Perkins v. Smith*, 116 N. Y. 441, 23 N. E. 21; *Matter of Ehrensans*, 37 App. Div. 272, 55 N. Y. S. 942; *Matter of Norton*, 39 App. Div. 369, 57 N. Y. S. 407; *Off v. Trapp*, 109 Ill. App. 49.

³³ *Rhodes v. Weldey*, 46 Ohio St. 234, 20 N. E. 461, 15 Am. St. Rep. 584; *Pitte v. Shipley*, 46 Cal. 154, 160; *Reg. v. Poor Law Commissioners*, 6 Ad. & E. 68; *Courtauld v. Legh*, L. R. 4 Ex. 126; *Smith v. Brown*, L. R. 6 Q. B. 729; *Re Kirkstall Brewery*, 5 Ch. Div. 535; *Werner v. Rochester*, 77 Hun, 33, 28 N. Y. S. 226. See *County Seat Linn County*, 15 Kan. 500; *Bates v. Bratton*, 96 Tex. 279, 72 S. W. 157.

³⁴ *Reg. v. Allen*, L. R. 1 C. C. 367.

³⁵ *Ruckmaboys v. Lulloobhoy Mat-*

tichand, 8 Moore, P. C. 4; *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396; *The Abbotsford*, 98 U. S. 440, 25 L. Ed. 168; *Wallace v. Taliaferro*, 2 Call (Va.), 389; 6 Bac. Abr. 379; *Campbell, Ex parte*, L. R. 5 Ch. 703; *State v. Brewer*, 22 La. Ann. 273; *United States v. Wilson*, Baldw. 78, 95, Fed. Cas. No. 16,730; *McKee v. McKee*, 17 Md. 352; *Woolsey v. Cade*, 54 Ala. 378; *County Seat of Linn Co.*, 15 Kan. 500; *Williams v. Lear*, L. R. 7 Q. B. 285; *School District v. School District*, 63 Ark. 543, 39 S. W. 850; *Einstein v. Sawhill*, 2 App. Cas. (D. C.) 10; *Gunning v. People*, 86 Ill. App. 174; *Nolan v. Milwaukee, etc. R. R. Co.*, 91 Wis. 16, 64 N. W. 319.

are presumed to be used in that sense, unless the contrary intent can be gathered from the statute.³⁶ But where the same language is not preserved, but is substantially varied, it shows a different intention.³⁷ And so the context may show that the same word used repeatedly in the same act is not used in the same sense.³⁸

§ 400. **Particular words and phrases construed.**—In this section are given some further illustrations of the foregoing general principles in the construction of words and phrases. It has seemed to the writer that these illustrations would be more valuable if the words and phrases construed were arranged in alphabetical order. This has accordingly been done, the words or phrases construed being given in italics at the beginning of each paragraph. There has been no attempt to make the references exhaustive under the several words and phrases treated, and the list includes only decisions rendered since the first edition was published.

Accounts, in a statute requiring all accounts against the county to be presented to the county commissioners before bringing suit, was held to mean any claim for money.³⁹

Aggrieved. A statute required the clerk of the court, when a change of venue was taken, to immediately make out a transcript of the record and transmit the same with

³⁶ *McKee v. McKee*, 17 Md. 352; 658; *Broadbudd v. Broadbudd*, 10 Bush, 299; *Eliot v. Himrod*, 108 Pa. St. 569, 573; *State v. Clark*, 57 Mo. 25; *Reg. v. Pratt*, 4 E. & B. 860. See *Coxson v. Doland*, 2 Daly, 66; *State v. Smith*, 46 Iowa, 670; *Winterfield v. Stauss*, 24 Wis. 394; *Lehman, Durr & Co. v. Robinson*, 59 Ala. 219; *Burgess v. Hargrove*, 64 Tex. 110.

³⁷ *Rutland v. Mendon*, 1 Pick. 154, 156; *Wills v. Russell*, 100 U. S. 621, 25 L. Ed. 607; *Rich v. Keyser*, 54 Pa. St. 86, 89; *Buck v. Spofford*, 31 Me. 34; *Pingree v. Snell*, 42 Me. 53; *Poe v. State*, 85 Tenn. 495, 3 S. W. 58 Pa. St. 213.

³⁸ *McMicken v. Commonwealth*, 58 Pa. St. 213.

³⁹ *Powder Riv. Cattle Co. v. Custer County Com'rs*, 9 Mont. 145, 23 Pac. 383.

the original papers to the clerk of the court to which the removal was ordered, and provided that, for a failure to do so, he should forfeit \$100 "to the party aggrieved." It was held that *aggrieved* was to be taken in its ordinary meaning, and that it was enough to entitle a party to the forfeiture if he was harassed and delayed by the failure.⁴⁰

Appeal, in a statute giving a right of appeal, was held to include a writ of error. "The popular and most comprehensive meaning of the word 'appeal,'" says the court, "is the removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial."⁴¹

Appropriate, in a statute providing that no land should be appropriated for cemetery purposes within two hundred yards of a dwelling-house, was held to cover the acquisition of land by either purchase or condemnation.⁴²

Bill of exchange, in forgery statute, held to include check.⁴³

Brothers and sisters. These words usually include those of the whole and the half blood and it was so held in the case cited.⁴⁴

Car held not to include tender of engine in statute forbidding use of *car* not equipped with automatic coupler.⁴⁵

Child, children. These words when used in a statute mean legitimate offspring unless there is something further which clearly shows the contrary.⁴⁶ In *Eshleman's Appeal*⁴⁷ the court say: "Both in England and America it has been held that the word 'child' may apply to and include 'grand-child.' The English statute of 22 and 23 Car. II., ch. 10, . . . relating to distribution, . . . provides that

⁴⁰ *Randol v. Garoutte*, 78 Mo. App. 609.

⁴¹ *State v. Jacksonville Terminal Co.*, 41 Fla. 363, 27 So. 321.

⁴² *Henry v. Trustees*, 48 Ohio St. 671, 30 N. E. 1122.

⁴³ *People v. Kemp*, 76 Mich. 410, 43 N. W. 439.

⁴⁴ *Stone v. Doster*, 7 Ohio C. C. 8.

⁴⁵ *Larabee v. New York, etc. R. Co.*, 182 Mass. 348, 66 N. E. 1032.

⁴⁶ *State v. Miller*, 3 Penn. (Del.) 518, 52 Atl. 262; *Alabama & V. Ry. Co. v. Williams*, 78 Miss. 209, 28 So. 853, 84 Am. St. Rep. 624; *Lavigne v. Lizeri des Patriotes*, 178 Mass. 25, 59 N. E. 674, 86 Am. St. Rep. 460.

⁴⁷ 74 Pa. St. 42, 46.

if a child shall be advanced; yet it is there held to extend to a grandchild, the father being dead.⁴⁸ Grandchildren and great-grandchildren are all children and come within that term for certain purposes.⁴⁹ It is allowed by all that if no children are in being, grandchildren come in under the word children and may be thereby described.⁵⁰ So grandchildren may take under the description of children in a will.⁵¹ In a trust for children it was held grandchildren were entitled to participate."⁵² But in a statute providing that exempt property, on the death of the husband or wife owning it, should go to the survivor and to the children of the decedent as tenants in common, and, if no children, then to the survivor alone, it was held that the word "children" did not include grandchildren.⁵³

Christian science. The practice of Christian science was held not the practice of medicine within a statute regulating the latter.⁵⁴

Citizen in a tax law was construed in its common meaning of inhabitant or resident.⁵⁵ But in a statute defining who may sign a petition in the matter of arranging school districts, it was held to mean an elector.⁵⁶

City in a constitutional provision as to the use of streets by corporations was held to include town.⁵⁷ In an act authorizing *cities* to appropriate money for the celebration of certain holidays, it was held that *cities* was used in a restricted sense and did not include towns.⁵⁸ An act in terms

⁴⁸ 1 Eq. Ab. 381, B. pl. 6; 382, B. pl. 8, 9, 10, 11.

⁴⁹ Wyth v. Blackman, 1 Ves. Sr. 197.

⁵⁰ Croke v. Brookling, 2 Vern. 107; Wythe v. Thurston, 2 Ambler, 555.

⁵¹ Royle v. Hamilton, 4 Ves. 437.

⁵² Crawhill's Trust, In re, 8 De G. Macn. & Gord. 480. See Burgess v. Hargrove, 64 Tex. 110.

⁵³ Peeler v. Peeler, 68 Miss. 141, 8 So. 392.

⁵⁴ State v. Mylod, 20 R. I. 632, 40 Atl. 753.

⁵⁵ Bacon v. State Tax Commissioners, 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524.

⁵⁶ School District v. School District, 63 Ark. 543, 39 S. W. 850.

⁵⁷ Pereria v. Wallace, 129 Cal. 397, 62 Pac. 61.

⁵⁸ Day v. Morristown, 63 N. J. L. 571, 41 Atl. 964.

applied to townships which contained a city of eight hundred or more inhabitants and provided for the organization of that part of the township outside of the city as a school district. It was held that the word "city" did not include towns and villages, and that, as there might be townships having incorporated towns or villages of the same population, the act did not operate uniformly and was void.⁵⁹ This seems contrary to the general rule that an act will, if possible, be so construed as to be valid.⁶⁰

Claim. A *claim* is, in a juridical sense, "a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty."⁶¹ In the same case Mr. Justice Story says: "A more limited, but at the same time an equally expressive, definition was given by Lord Dyer, as cited in *Stowell v. Zouch*, Plowden, 359, that "a claim is a challenge by a man of the propriety or ownership of a thing which he has in possession, but which is wrongfully detained from him."

"In its ordinary sense," said Scott, J., "a *claim* imports the assertion, demand or challenge of something as a right, or it means the thing thus demanded or challenged. The word, as here used, is by implication limited to claims against the state, and of a pecuniary character. The inhibition is against the *payment of any money on any claim*, etc. Claims for the payment of money may be preferred against the state on various grounds. They may be either of a legal or of an equitable character. They may purport to arise under existing laws, or to originate in circumstances which are supposed to cast upon the state a duty, either of perfect or imperfect obligation, to provide for their payment. All such demands against the state for the payment of money, whatever may be their character or origin, are, we think, *claims* within the meaning of the constitution."⁶²

⁵⁹ *Plummer v. Borsheim*, 8 N. D. 565, 80 N. W. 690.

⁶⁰ *Ante*, § 83.

⁶¹ *Prigg v. Pennsylvania*, 16 Pet. 539, 615, 10 L. Ed. 1060.

⁶² *Fordyce v. Godman*, 20 Ohio St. 1, 14.

Clerk. An act made stockholders, in case of insolvency of the corporation, individually liable for all moneys due to the laborers, servants, clerks and operatives of the company. An employee of a plow company, on a salary of one hundred dollars a month, who spent part of his time as a traveling salesman and part in the store of the company, receiving, shipping and selling goods, was held to be a clerk within the statute.⁶³

Commodity. A penal code made it a criminal offense to make or give an option to sell or buy any grain or other commodity. Bonds were held to be a commodity within the statute.⁶⁴ The constitution of Massachusetts gives the legislature power to impose duties and excises upon produce, goods, wares, merchandise and commodities whatsoever. The privilege of transmitting or receiving property by will or descent was held to be a commodity within the provision.⁶⁵

County printing. A statute required all *county printing* to be done within the state and if practicable within the county. It was held that "county printing" included not only notices and matter to be published, but also all kinds of printed blanks and supplies.⁶⁶

Court. The word "court" in a statute giving a discretion to the *court* to punish by fine or imprisonment, or both, was held to mean the judge and jury and not the judge alone, the constitution requiring the jury to fix the punishment.⁶⁷

Credible witness in a statute requiring wills to be subscribed in the presence of two credible witnesses were held to mean competent witnesses.⁶⁸

⁶³ *Hand v. Cole*, 88 Tenn. 400, 12 S. W. 922. See *Cook, Stockholders*, § 215.

⁶⁴ *Peterson v. Currier*, 62 Ill. App. 163.

⁶⁵ *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259.

⁶⁶ *Tribune Printing & B. Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904.

⁶⁷ *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 59 S. W. 1033.

⁶⁸ *Fuller v. Fuller*, 83 Ky. 345; *Bramel v. Bramel*, 101 Ky. 64, 39 S. W. 520.

Crimes includes both felonies and misdemeanors in a statute conferring jurisdiction on a court of all crimes committed within the county.⁶⁹

Damages. A statute required street railroad companies, before taking or damaging any property in the construction of their roads, to cause to be ascertained and paid the *damages* that will be done by the building and operation of such railroad to the real and personal property situated on the route. It was held that the word "damages" was used in the same sense as the word was used in the eminent domain provision of the constitution, as the same had been construed by the court.⁷⁰

Debt. A mortgage on the land of a decedent, though not made by him and not a personal liability, was held to be a *debt* within a statute authorizing the borrowing of money by way of a mortgage on the estate of a deceased person "for the purpose of paying *debts* against the estate."⁷¹

Depositors in a bank includes those who hold certificates of deposit.⁷²

Descends, descent. These words may include property passing by will as well as by operation of law.⁷³

Directly in a statute that no license shall be granted for the sale of liquors in any place, except licensed taverns, to which an entrance shall be allowed other than *directly* from a public traveled way, means straight, not a circuitous or round-about way.⁷⁴

Distance on a river within which no other bridge may be built, held to be measured by the course of the river.⁷⁵

⁶⁹ Commonwealth v. Rothschild, 11 Pa. Dist. Ct. 683.

⁷⁰ Ruckert v. Grand Ave. Ry. Co., 163 Mo. 260, 63 S. W. 814.

⁷¹ In re Estate of Lambie, 94 Mich. 489, 54 N. W. 173.

⁷² Murphy v. Pacific Bank, 130 Cal. 542, 62 Pac. 1059.

⁷³ Mitchell v. Blanchard, 72 Vt. 85, 47 Atl. 98.

⁷⁴ State v. Conley, 23 R. I. 397, 48 Atl. 200.

⁷⁵ McLeod v. Burroughs, 9 Ga. 213. Held, should be measured in a straight line in Catawba Toll Bridge Co. v. Flowers, 110 N. C. 381, 14 S. E. 918.

Domestic animals held to include dogs, in a statute making all domesticated animals and birds, when proved to be of any specific value, the subject of theft.⁷⁶

Drunkenness in divorce statute held not to include intoxication produced by hypodermic injections of morphine, but to be taken in its popular sense of intoxication produced by the use of alcoholic liquors.⁷⁷

Due held to include debts owed and not merely debts matured.⁷⁸

Enclosed lands. Held that lands were enclosed if bounded in part by a fence and in part by water.⁷⁹

Establish may mean the original institution of a thing or to put a thing, already in existence, on a firm basis, to put it in a settled and efficient condition.⁸⁰ Under a statute which authorized towns to establish hospitals in or near the town it was held that where a farm was purchased for a smallpox hospital, under a resolution of the council authorizing the purchase for that purpose, the hospital was *established* within the meaning of the act.⁸¹

Father held not to include step-father in statute as to wrongful death.⁸²

Freeholder held to include a married woman owning land in fee, in statute requiring a petition by freeholders for an election on an issue of bonds.⁸³

From. A statute authorized the construction of a deep-water channel *from the waters of the Gulf of Mexico*, etc. It was held to mean from any bay, inlet or stream connected with the gulf in which the tide ebbs and flows.⁸⁴

⁷⁶ Hurley v. State, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916.

⁷⁷ Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313.

⁷⁸ United States Blowpipe Co. v. Spencer, 40 W. Va. 698, 21 S. E. 769.

⁷⁹ Daley v. State, 40 Tex. Crim. App. 101, 48 S. W. 515.

⁸⁰ State v. Rogers, 107 Ala. 444, 19 So. 909.

⁸¹ Richmond v. Supervisors, 83 Va. 204, 2 S. E. 26.

⁸² Thornburg v. Am. Strawboard Co., 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334.

⁸³ Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411.

⁸⁴ Crary v. Port Arthur Channel & Dock Co., 92 Tex. 275, 47 S. W. 967.

Game held to include a horse race.⁸⁵ A game of hazard or skill, in a statute making it a penal offense to bet on such a game, includes base-ball.⁸⁶

Gift held not to include gifts *causa mortis*.⁸⁷

Goods and chattels held not to include choses in action in statute as to fraudulent conveyances.⁸⁸

Goods, wares and merchandise held to include mules and horses.⁸⁹

Grain may include broom-corn in bales before threshing, but not after.⁹⁰ In the penal provisions of a warehouse law *grain* was held to include flax.⁹¹

Greater part in statute requiring suit for partition of lands to be brought in the county "in which an equal or greater part of such premises may be," held to refer to quantity, not value.⁹²

Heir. The word "heir" in its technical sense means one capable of inheriting.⁹³ It may include the widow of a deceased person.⁹⁴ In a statute as to wrongful death the action was given, first, to the husband or wife, and, second, if no husband or wife, or if they fail to sue within a year, then to the heir or heirs of the deceased. It was held that the words "heir or heirs" meant child or children and did not include collateral kindred.⁹⁵

⁸⁵ *Miller v. United States*, 6 App. Cas. (D. C.) 6. See also to same effect, *Cheek v. Commonwealth*, 100 Ky. 1, 37 S. W. 152. A lottery is a game. *Ex parte Kameta*, 36 Ore. 251, 60 Pac. 394, 78 Am. St. Rep. 775.

⁸⁶ *Mace v. State*, 58 Ark. 79, 22 S. W. 1108; *State v. Williams*, 35 Mo. App. 541.

⁸⁷ *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 S. E. 848.

⁸⁸ *Schwacker v. Ludington*, 77 Mo. App. 415.

⁸⁹ *Pilcher v. Faircloth*, 135 Ala. 311, 33 So. 545.

⁹⁰ *Reavis v. Farmers' Mut. Fire Ins. Co.*, 78 Mo. App. 14.

⁹¹ *State v. Cowdery*, 79 Minn. 94, 81 N. W. 750, 48 L. R. A. 92.

⁹² *Johnson v. Detrick*, 152 Mo. 243, 53 S. W. 891.

⁹³ *State v. Engle*, 21 N. J. L. 347.

⁹⁴ *Lyons v. Yerex*, 100 Mich. 214, 58 N. W. 1112, 43 Am. St. Rep. 452; *Pleimann v. Hartung*, 84 Mo. App. 283.

⁹⁵ *Hindry v. Holt*, 24 Colo. 464, 51 Pac. 1002, 65 Am. St. Rep. 235, 39 L. R. A. 351.

Highest office. An act provided for a remonstrance against granting a saloon license, to be signed by a majority of the voters of the town or ward affected, and that the number required to constitute a majority of voters should be determined by the aggregate vote cast for the candidate for the *highest office* at the last preceding election. In the case cited, at the last election a secretary of state, state auditor and treasurer and two judges of the supreme court were elected. It had been the practice when a governor was elected to put the candidate for governor first on the ticket, and, when not, then the secretary of state. This was held to be a practical determination of the question, and it was presumed that the words were used with reference to this practice, and so that the secretary of state, in the case in question, was the *highest officer* within the meaning of the statute.⁹⁶

Highway held to include streets and alleys in cities.⁹⁷

House. A fruit stand in the shape of a piano box, eight by ten feet on the ground, and eight feet high, and provided with shelves and counter, was held to be a *house* within a burglary statute.⁹⁸

Householder held to mean the head of a family living in a house and not to include a bachelor living alone in a house.⁹⁹

House of prostitution held to include a house prepared and designed for the purpose of prostitution, though not yet so used.¹

Immediately. A statute required the county treasurer to make the delinquent tax list on the 1st day of April and to *immediately* certify and file it with the clerk of the district court. The statute was held to mean that the thing should be done in a reasonable time; and, where the list was com

⁹⁶ Massey v. Dunlap, 146 Ind. 350, 44 N. E. 641.

⁹⁷ Chamberlain v. Iowa Telephone Co., 119 Iowa, 619, 93 N. W. 596.

⁹⁸ Willis v. State, 33 Tex. Crim. Rep. 168, 25 S. W. 1119.

⁹⁹ Peterson v. Bingham, 13 Wash. 178, 43 Pac. 22.

¹ People v. Cook, 96 Mich. 368, 55 N. W. 980.

pleted and filed on the 9th of April, it was held that the statute was complied with.² A statute permitted an appeal from justices of the peace and police justices in criminal cases, provided the defendant "shall, *immediately* after judgment is rendered, file an affidavit stating he is aggrieved," etc. Held that the word "immediately" meant "within such convenient time as is requisite for doing the thing," and that filing the affidavit on the next day after judgment was too late.³

Injury to person, in a statute that no action for homicide, *injury to the person*, or injury to property, shall abate by death, was held to include libel.⁴

In substance. A statute required an administrator licensed to sell real estate to take an oath "*in substance* as follows," etc. It was held that "the words 'in substance' were used in opposition to form, and to signify that the form or language of the statute was not required, if the real or essential part was observed and complied with."⁵

Internal improvements. An act of congress provided that five per cent. of the proceeds of the sales of certain public lands in the state of Colorado should be paid over to the state "for the purpose of making such *internal improvements* within such state as the legislature thereof may direct." It was held that public buildings were not internal improvements within the act.⁶

² *State v. St. Paul Trust Co.*, 76 Minn. 423, 79 N. W. 543. The court says: "This word 'immediately' is to be given a rational construction, and it does not, in legal proceedings or in statutes, necessarily import the exclusion of any interval of time. It is a word of no very definite signification, and it is much in subjection to its grammatical and other connections. Here, from its very connection, it must mean within a reasonable

time, because it would be impossible for the treasurer to make up his list and to certify and file it on the same day,—except, perhaps, in one of the smaller counties." p. 427.

³ *St. Louis v. R. J. Gunning Co.*, 138 Mo. 347, 39 S. W. 788.

⁴ *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. 250.

⁵ *Hugo v. Miller*, 50 Minn. 105, 53 N. W. 381.

⁶ *In re Internal Imp. Fund*, 24 Colo. 247, 48 Pac. 807.

In transit. Logs and lumber piled along a railroad track awaiting shipment were held not to be *in transit* within the meaning of a statute as to the place of assessing such property when *in transit*.⁷

Jail held to include a city calaboose.⁸

Judgment held to include condemnation judgment in statute giving interest on judgments.⁹

Life insurance companies held to include mutual benefit societies in statute forbidding discrimination.¹⁰

Lot held to be synonymous with *tract* or *parcel* in a statute providing for an assessment upon each and every *lot* in front of which water mains are laid, and a tract of sixty-five acres was held to be a lot within the statute.¹¹

Man, in statute against fornication, held to include a minor who has arrived at the age of puberty.¹²

Manufacturer held not to include a merchant tailor.¹³

Medicine. An act to regulate the practice of medicine was held to include osteopathy,¹⁴ but not christian science.¹⁵

Mercantile agent includes one who goes about with samples taking orders for future delivery.¹⁶

Merchant held to include ice dealers in statute as to licensing occupations.¹⁷

Mortgage includes trust deeds given as security.¹⁸

Municipality held to include counties.¹⁹

⁷ *Mauer v. Cliff*, 94 Mich. 194, 53 N. W. 1055.

⁸ *Starks v. State*, 38 Tex. Crim. App. 233, 42 S. W. 379.

⁹ *Plum v. Kansas City*, 101 Mo. 525, 14 S. W. 657, 10 L. R. A. 371.

¹⁰ *Citizens' Life Ins. Co. v. Commissioner of Insurance*, 128 Mich. 85, 87 N. W. 126.

¹¹ *State v. Robert P. Lewis Co.*, 72 Minn. 87, 75 N. W. 108.

¹² *State v. Seiler*, 106 Wis. 346, 82 N. W. 167.

¹³ *State v. Johnson*, 20 Mont. 367, 51 Pac. 820.

¹⁴ *Bragg v. State*, 134 Ala. 165, 83 So. 767.

¹⁵ *State v. Mylod*, 20 R. I. 632, 40 Atl. 753.

¹⁶ *Brookfield v. Kitchen*, 163 Mo. 546, 63 S. W. 325.

¹⁷ *Kansas City v. Vindquest*, 36 Mo. App. 584.

¹⁸ *Walton v. Fudge*, 63 Mo. App. 52; *Wells v. Bents*, 86 Mo. App. 264.

¹⁹ *Lund v. Chippewa County*, 93 Wis. 640, 67 N. W. 927, 34 L. R. A. 131; *Wisconsin Industrial School v. Clark County*, 103 Wis. 651, 79 N. W. 422.

Newspaper of general circulation means one which circulates throughout the state, not merely in one county.²⁰

Next of kin in a statute disqualifying a party as a witness in regard to any personal transaction between such witness and a deceased person, against the executor, administrator, heir at law, next of kin, etc., of such deceased person, was held to include the widow of a deceased person.²¹

Osteopathy held to be the practice of medicine within an act regulating such practice.²²

Owner. A person in possession under a contract of purchase was held to be an *owner* within a mechanic's lien statute.²³ But a mortgagee is not.²⁴ A lessee was held to be an *owner* within a statute making the *owners* of reservoirs liable for damage from leakage, overflow, etc.²⁵ A statute provided that no license to sell liquor at a place should be granted if the *owners* or occupants of the greater part of the land within two hundred feet thereof objected. A city, as owner of a park, was held to be an *owner* within the statute.²⁶

Person. Ordinarily the word *person* includes corporation.²⁷ "The word person is a generic term, including both natural and artificial persons. It does not always in statutes embrace corporations, but where, as here, there is nothing in the subject-matter or the context to indicate a pur-

²⁰ Koen v. State, 35 Neb. 676, 53 N. W. 595, 17 L. R. A. 821.

²¹ French v. French, 84 Iowa, 655, 51 N. W. 145, 15 L. R. A. 300; Power v. Hafley (Ky.), 4 S. W. 683; Betsinger v. Chapman, 88 N. Y. 488; Steet v. Kurtz, 28 Ohio St. 195; Hibbard v. Odell, 16 Wis. 664.

²² Bragg v. State, 134 Ala. 165, 32 So. 767.

²³ Jameson v. Gile, 98 Iowa, 490, 67 N. W. 396.

²⁴ Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912.

²⁵ Larimer Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111.

²⁶ Dexter v. Sprague, 22 R. I. 324, 47 Atl. 889.

²⁷ Durbin v. People, 54 Ill. App. 101; Heintz v. Mueller, 19 Ind. App. 240, 49 N. E. 293; Albion Nat. Bank v. Montgomery, 54 Neb. 681, 74 N. W. 1102; Turcott v. Railroad Co., 101 Tenn. 102, 50 S. W. 769, 70 Am. St. Rep. 661, 40 L. R. A. 768; Crawford v. Supervisors, 87 Va. 110, 12 S. E. 147, 10 L. R. A. 129.

pose to use it in the limited sense of natural persons, and the object of the statute is fully subserved only by applying the general meaning, and including therein artificial persons, this general application should be made."²⁸ The word "person" was held to include a county in a statute as to the foreclosure of tax liens,²⁹ but not to include municipalities in the garnishment law.³⁰

Peddler held not to include a book canvasser.³¹

Penalty in a statute was held to include injunctions.³²

Personal representative held to include widow, where she took all of her deceased husband's estate, under the statute, without administration.³³

Petition. A petition for the purpose of submitting a proposition to vote may consist of many duplicates signed separately and attached together.³⁴

Picture, in a statute prohibiting the sale of obscene pictures, includes a photographic negative.³⁵

Prairie land within a statute as to setting fires includes a meadow covered with wild grass and never under cultivation.³⁶

Provisions held to include fruits and lemons which, though not strictly articles of food, are used for flavoring and the like;³⁷ also corn in the shock.³⁸

Public place. A depot was held to be a public place within a statute making it a misdemeanor for any one to be found in a state of intoxication in a *public place*.³⁹ Club

²⁸ Heintz v. Mueller, 19 Ind. App. 240, 247, 49 N. E. 293.

²⁹ Lancaster County v. Trimble, 34 Neb. 752, 52 N. W. 711.

³⁰ Dollman v. Moore, 70 Miss. 267, 12 So. 23, 19 L. R. A. 222.

³¹ Emmons v. Lewistown, 132 Ill. 380, 24 N. E. 58, 22 Am. St. Rep. 540, 8 L. R. A. 328.

³² State v. Van Vliet, 92 Iowa, 476, 61 N. W. 241.

³³ Johnson v. Champion, 88 Ga. 527, 15 S. E. 15.

³⁴ Smith v. Patton, 103 Ky. 444, 45 S. W. 459.

³⁵ People v. Ketchum, 103 Mich. 443, 61 N. W. 776, 50 Am. St. Rep. 383, 27 L. R. A. 448.

³⁶ Lewis v. Schultz, 98 Iowa, 341, 67 N. W. 266.

³⁷ State v. Angell, 71 N. H. 224, 51 Atl. 905.

³⁸ Cochran v. Harvey, 88 Ga. 352, 14 S. E. 580.

³⁹ Pratt v. Brown, 80 Tex. 608, 16 S. W. 443.

rooms to which only members and their guests are admitted were held not a public place within a statute which forbade the playing of cards in a *public place*.⁴⁰

Railroad. Whether the word "railroad" includes street railroads is a question of intent, to be gathered from the purpose of the statute and the history of legislation. In some cases it has been held to include them,⁴¹ and in some not.⁴²

Real estate in statute giving compensation for damages to real estate by a change of grade was held not to include a lease for years.⁴³

Relative. A step-father was held to be a relative within a statute which forbade the issue of a benefit certificate unless the beneficiary was the husband, wife, relative, legal representative, heir or legatee of the insured.⁴⁴

Residence in statute giving the landlord a lien on all property of the tenant situated in the residence demised, held to include not only the dwelling, but the premises,—the buildings and grounds used in connection with the dwelling.⁴⁵

Rights and effects in attachment act was held to include shares of stock.⁴⁶

Road in a statute that, when any road or portion thereof shall have been used, worked and kept in repair as a public highway for six years, it shall be deemed to have been dedicated to the public as a highway, was held to include a city street.⁴⁷

⁴⁰ *Grant v. State*, 33 Tex. Crim. Rep. 527, 27 S. W. 127.

⁴¹ *Bammel v. Kirby*, 19 Tex. Crim. App. 198, 47 S. W. 392.

⁴² *Fidelity L. & T. Co. v. Douglas*, 104 Iowa, 532, 73 N. W. 1039; *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208; *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed. 82; *Massachusetts L. & T. Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46.

⁴³ *Matter of Ehrensans*, 37 App. Div. 272, 55 N. Y. S. 942.

⁴⁴ *Simcoke v. Grand Lodge*, 84 Iowa, 383, 51 N. W. 60, 15 L. R. A. 114.

⁴⁵ *York v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257.

⁴⁶ *Union National Bank v. Byram*, 131 Ill. 92, 22 N. E. 842.

⁴⁷ *Benson v. St. Paul, etc. Ry. Co.*, 62 Minn. 198, 64 N. W. 393; *Hall v. St. Paul*, 56 Minn. 428, 57 N. W. 928; *Elfelt v. Stillwater St. Ry. Co.*, 53 Minn. 68, 55 N. W. 116.

Saloon means a place where intoxicating liquors are sold.⁴⁸

Set line in statute forbidding the use of set lines in fishing was held to mean a line with many hooks attached and secured to a buoy. Five common lines with one hook at the end of each, fastened to a stake on the shore and extending into the water, were held not to be "set lines" within the act.⁴⁹

Side tracks in a statute as to the assessment for taxation of railroad property includes the land on which they are laid and includes a yard with tracks and used for handling cars and loading and unloading.⁵⁰

Since held to have the meaning of *after* in an act applying to every corporation incorporated "since January 1, 1890."⁵¹

Sinking fund. "The law in this country has impressed upon the term 'sinking fund' a fixed, technical signification. It is a fund arising from particular taxes, imposts or duties, which is appropriated towards the payment of the interest due on a public debt, and for the 'gradual payment of the principal.' When the term 'sinking fund' is used in a statute it must be understood to have been used in its technical sense."⁵²

Slander was held to include libel in a statute that no action for injury to person or property shall cease or die with the person injuring or injured, "except actions for assault, slander," etc.⁵³

Storehouse held not to include a room in the cellar of a dwelling where wine is kept for family use.⁵⁴

⁴⁸ Ex parte Livingston, 20 Nev. 282, 21 Pac. 322.

⁴⁹ State v. Stevens, 69 Vt. 411, 38 Atl. 80.

⁵⁰ State v. Hannibal, etc. R. R. Co., 135 Mo. 618, 37 S. W. 532.

⁵¹ Roland Park Co. v. State, 80 Md. 448, 31 Atl. 298.

⁵² State v. Sinking Fund Com'rs, 1 Tenn. Cases, 490.

⁵³ Johnson's Adm'x v. Haldeman, 102 Ky. 163, 43 S. W. 226.

⁵⁴ Mason v. Commonwealth, 101 Ky. 397, 41 S. W. 305. Storehouse and warehouse held to be synonymous. State v. Watson, 141 Mo. 338, 42 S. W. 726.

State held to include territory in the national banking act.⁵⁵

Statute held to include a freeholder's charter.⁵⁶

Street or highway in statute giving a remedy for injuries sustained by reason of defects in streets and highways, held not to include a public alley.⁵⁷

Street work. Lighting the streets of a city is not "street work" within a statute that requires all street and sewer work and the furnishing of supplies therefor to be let to the lowest bidder.⁵⁸

Structure. A statute imposed a penalty upon any person who should displace, remove, injure or destroy any rail, sleeper, switch, bridge, viaduct, culvert, embankment or *structure* attached or appurtenant to or connected with any railroad. It was held that a fence was not a structure within the statute.⁵⁹ A statute authorized an injunction to restrain the erection of any *structure* intended to spite, injure or annoy an adjoining proprietor. A fence was held to be a structure within the statute.⁶⁰

Suit held to include not only civil actions but also criminal prosecutions by indictment or information.⁶¹

Surety held not to include indorser.⁶²

Tax may include a special assessment.⁶³

Telegraph — Telephone. "The rule is well established that in applying the principles of the common law, or in construing statutes, the telephone is to be considered a telegraph, unless express statutory provisions govern the case."⁶⁴

⁵⁵ Talbot v. Silver Bow County, 139 U. S. 438, 11 S. C. Rep. 594, 35 L. Ed. 210.

⁵⁶ Frick v. Los Angeles, 115 Cal. 512, 47 Pac. 250.

⁵⁷ Face v. Ionia, 90 Mich. 104, 51 N. W. 184.

⁵⁸ Electric Light & P. Co. v. San Bernardino, 100 Cal. 348, 34 Pac. 819.

⁵⁹ State v. Walsh, 43 Minn. 444, 45 N. W. 721.

⁶⁰ Karasek v. Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

⁶¹ Snowden v. State, 69 Md. 203, 14 Atl. 523.

⁶² Rice v. Darrian, 57 Ark. 541, 23 S. W. 213.

⁶³ Gauen v. Moredock Drainage Dist., 131 Ill. 446, 23 N. E. 633.

⁶⁴ Northwestern Tel. Exch. Co. v. Chicago, etc. Co., 76 Minn. 334, 79 N. W. 315; Northwestern Tel. Exch.

Term of court signifies the whole period from the opening to the end, including temporary adjournments.⁶⁵

Town. This is a word of uncertain significance, and its meaning in any particular statute must be determined from the context and other circumstances. It may be used in a strict sense, as denoting an incorporated town or township,⁶⁶ or it may be used in a generic sense to denote all kinds of municipal corporations,⁶⁷ or it may mean simply a collection of inhabited houses in close proximity, though not incorporated.⁶⁸

Unmarried woman, in a statute providing that the will of an unmarried woman shall be revoked by her subsequent marriage, includes a widow, the meaning being a woman not at the time in the state of marriage.⁶⁹

Vacancy in office. There may be a vacancy in an office which has never been filled.⁷⁰

Village may mean an incorporated village,⁷¹ or any aggregation of inhabited dwellings in close proximity.⁷²

Void is a word that is construed to mean void or voidable according to the purpose and intent of the act. It was held to mean voidable in the following cases: An act that a sale by an administrator or executor to himself directly or indirectly shall be void;⁷³ an act that all acts of any officer of a bank in indorsing, selling or pledging the paper shall be null and void;⁷⁴ an act that all acts and contracts of for-

Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69.

⁶⁵ Hadley v. Bernero, 97 Mo. App. 314, 75 S. W. 451.

⁶⁶ County Court v. Schwarz, 13 Colo. 291, 22 Pac. 783; Hermann v. Guthenberg, 63 N. J. L. 616, 44 Atl. 758.

⁶⁷ Lynn v. County Com'rs, 153 Mass. 40, 26 N. E. 409; State v. Glen Ridge, 59 N. J. L. 201, 35 Atl. 913; State v. Union, 62 N. J. L. 142, 40 Atl. 632.

⁶⁸ State v. Eidson, 76 Tex. 302, 13 S. W. 263.

⁶⁹ Matter of Will of Kaufman, 131 N. Y. 620, 30 N. E. 242.

⁷⁰ State v. Scott, 36 W. Va. 704, 15 S. E. 405; Walsh v. Commonwealth, 89 Pa. St. 419.

⁷¹ Nolan v. Milwaukee, etc. R. R. Co., 91 Wis. 16, 64 N. W. 319.

⁷² State v. Meek, 26 Wash. 405, 67 Pac. 76.

⁷³ Veeder v. McKinley, etc. Loan & T. Co., 61 Neb. 892, 86 N. W. 982.

⁷⁴ Hume v. Eagon, 73 Mo. App. 271.

eign corporations made before complying with certain conditions shall be void as to such corporations.⁷⁵ It was held to mean absolutely void in the following cases: An act forbidding members of the county board being interested in county contracts and declaring such contracts void;⁷⁶ a provision in a tax law declaring mortgages on land in more than one county to be void.⁷⁷

Wagon held not to include a bicycle as used in exemption statute.⁷⁸

Water closet. A statute required buildings to be furnished with sufficient *water closets* connected with the sewer. It was held that a privy so connected was not a water closet within the meaning of the statute.⁷⁹

Wholesale quantities. A local option act provided that nothing in the act should affect the right of a manufacturer to sell the product of his factory in *wholesale quantities* to *bona fide* retail dealers, but did not define what should constitute wholesale quantities. It was held that the provision was not void for uncertainty, but as another statute fixed the quantity that a manufacturer might sell at one gallon or more, it was deemed that this was what the legislature had in mind and intended.⁸⁰

Wilful when used in a statute creating a criminal offense implies the doing of the act purposely and deliberately in violation of law.⁸¹

⁷⁵ *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446.

⁷⁶ *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 245, 75 N. W. 964, 69 Am. St. Rep. 915.

⁷⁷ *Denny v. McCoon*, 34 Ore. 47, 54 Pac. 952.

⁷⁸ *Shadewald v. Phillips*, 72 Minn. 520, 75 N. W. 717.

⁷⁹ *Commonwealth v. Roberts*, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400. The court says: "The legislature, by the use of the word 'water closet,' intended an ar-

rangement then in common use, connected with a sewer, and having a permanent water supply which can be used systematically and regularly for carrying whatever is deposited therein to the sewer, and not a privy vault, which although connected with a sewer has no water supply for flushing it, except such as depends on chance." p. 283.

⁸⁰ *Lloyd v. Dollison*, 13 Ohio C. D. 571.

⁸¹ *State v. Whitener*, 93 N. C. 590;

Work in mechanics' lien law is held to include superintendence.⁸²

§ 401 (256). **Change of phraseology of statute.**—"It has been a general rule," says Blackburn, J., "for drawing legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning; and it would be as well if those who are engaged in the preparation of acts of parliament would bear in mind that that is the real principle of construction."⁸³ Whether the change be by omission, addition or substitution of words, the principle applies.⁸⁴ Where changes have been introduced by amendment it is not to be assumed that they are without design.⁸⁵ Every change of phraseology, however, does not indicate a change of substance and intent. The change may be made to express more clearly the same intent or merely to improve the diction.⁸⁶ The change is often found to be the result of carelessness or slovenliness of the draftsman.⁸⁷ The changes of phraseology may result from the act being the production of many minds, and from being compiled from different sources.⁸⁸ Hence the presumption of a change of intention from a change of lan-

State v. Smith, 52 Wis. 134, 8 N. W. 870; State v. Preston, 34 Wis. 675.

⁸² Fischer v. Hanna, 8 Colo. App. 471, 47 Pac. 303.

⁸³ Hadley v. Perks, L. R. 1 Q. B. 457; Dickenson v. Fletcher, L. R. 9 C. P. 8; Casement v. Fulton, 5 Moore's P. C. 141.

⁸⁴ Lawrence v. King, L. R. 3 Q. B. 345; Reg. v. Bullock, L. R. 1 C. C. 117; Eliot v. Himrod, 108 Pa. St. 569, 573; Reg. v. Price, L. R. 6 Q. B. 411; West v. Francis, 5 B. & Ald. 737; Reg. v. Ingham, 5 B. & S. 257; Bond v. Rosling, 1 id. 371; Parker v. Taswell, 2 DeG. & J. 559; Tidey v. Mollett, 16 C. B. (N. S.)

298; Springfield Grocer Co. v. Walton, 95 Mo. App. 526, 69 S. W. 477; Yarborough v. Collins, 91 Tex. 306, 42 S. W. 1052; United States v. Bashaw, 50 Fed. 749, 1 C. C. A. 653, 4 U. S. App. 360.

⁸⁵ Duff v. Karr, 91 Mo. App. 16.

⁸⁶ Hadley v. Perks, L. R. 1 Q. B. 457; Re Wright, L. R. 3 Ch. Div. 78; Reg. v. Frost, 9 C. & P. 127; Hugo v. Miller, 50 Minn. 105, 52 N. W. 381; State v. Dotson, 26 Mont. 305, 67 Pac. 938; County Line Case, 6 Pa. Dist. Ct. 712.

⁸⁷ Re Wood, L. R. 7 Ch. 306; Reg. v. Buttle, L. R. 1 C. C. 250.

⁸⁸ Endlich on St., § 378.

guage is of no great weight, and must mainly depend on the intrinsic difference as resulting from the modification.⁸⁹ A mere change in the words of a revision will not be deemed a change in the law unless it appears that such was the intention. The intent to change the law must be evident and certain; there must be such substantial change as to import such intention, or it must otherwise be manifest from other guides of interpretation, or the difference of phraseology will not be deemed expressive of a different intention.⁹⁰ Revisions naturally involve some modifications of expression to bring the laws into system and uniformity.⁹¹

⁸⁹ See *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366; *Rolle v. Whyte*, L. R. 3 Q. B. 305; *Sherborn v. Wells*, 3 B. & S. 784; *Bosley v. Davies*, 1 Q. B. Div. 84; *Skinner v. Usher*, L. R. 7 Q. B. 423; *Curtis v. Embery*, L. R. 7 Ex. 369; *Reg. v. South Weald*, 5 B. & S. 391; *Jarman, Ex parte*, 4 Ch. Div. 835; *Haldane v. Beauclerk*, 3 Ex. 658; *Montague v. Smith*, 17 Q. B. 688; *Cates v. Knight*, 3 T. R. 442; *Murray v. Keyes*, 35 Pa. St. 384, 390; *Rich v. Keyser*, 54 id. 86; *Reg. v. Pratt*, 4 E. & B. 860; *Read v. Edwards*, 17 C. B. (N. S.) 245.

⁹⁰ *Landford v. Dunklin*, 71 Ala. 594; *Dudley, Adm'r, v. Steele*, id. 423; *Re Brown*, 21 Wend. 316; *Yates' Case*, 4 John. 318; *Domick v. Michael*, 4 Sandf. 374; *Theriat v. Hart*, 2 Hill, 380; *People v. Deming*, 1 Hilt. 271; *Coxson v. Doland*, 2 Daly, 66; *Croswell v. Crane*, 7 Barb. 191; *Hoffman v. Delihanty*, 13 Abb. Pr. 388; *Douglas v. Douglas*, 5 Hun, 140; *Parramore v. Taylor*, 11 Gratt. 220, 242; *Hughes v. Farrar*, 45 Me. 72; *Trigg v. State*,

49 Tex. 645; *Overfield v. Sutton*, 1 Metc. (Ky.) 621; *Allen v. Ramsey*, id. 635; *Duramus v. Harrison*, 26 Ala. 326; *Anthony v. State*, 29 Ala. 27; *McNamara v. R. R. Co.*, 12 Minn. 388; *Gaston v. Merriam*, 33 id. 271, 22 N. W. 614; *Glass v. State*, 30 Ala. 529; *Burnham v. Stevens*, 33 N. H. 249; *Bradley v. State*, 69 Ala. 318; *Chambers v. Carson*, 2 Whart. 9; *Commonwealth v. Rainey*, 4 W. & S. 186; *Smith v. Smith*, 19 Wis. 522; *Conger v. Barker*, 11 Ohio St. 1; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Ennis v. Crump*, 6 Tex. 34; *McMicken v. Commonwealth*, 58 Pa. St. 213; *Smith v. Mitchell*, Rice (S. C.), 315; *Westfield Cem. Ass'n v. Darrielson*, 62 Conn. 319, 26 Atl. 345; *Constitution Pub. Co. v. De Laughter*, 95 Ga. 17, 21 S. E. 1000; *Grier v. State*, 103 Ga. 428, 30 S. E. 255; *Cummings v. Everett*, 82 Me. 260, 19 Atl. 456; *St. George v. Rockland*, 89 Me. 43, 35 Atl. 1033; *Hugo v. Miller*, 50 Minn. 105, 52 N. W. 381; *McGrath v. St. Louis, etc. R. R. Co.*, 128 Mo. 1, 30 S. W. 329; *State v. Dotson*, 26 Mont. 305, 67

⁹¹ This section is cited and followed and substantially quoted

and approved in *Hugo v. Miller*, 50 Minn. 105, 52 N. W. 381.

§ 402. Same — Illustrations.— A statute provided that the defendant in a criminal case might testify in his own behalf, and that the jury in judging of his credibility *shall* take into consideration the fact that he is the defendant and the nature and enormity of the crime with which he is charged. In a subsequent revision *shall* was changed to *may*, but it was held that no change of sense was intended.⁹² A statute provided that if any person shall be found on the first day of the week “buying or selling goods, wares or merchandise, chattels or liquors, or any other kind of property,” or engaged in any labor except works of necessity, he should be punished. The statute was amended and the words quoted omitted. It was held that it was not the intent to exclude such buying and selling from the operation of the statute, but to include such business under the head of labor and make it subject to the qualification contained in the exception.⁹³ An act for the organization of industrial schools provided that the expense of children committed to the schools should be paid by the counties from which they were sent. The law was afterwards revised and this provision omitted, and the revised statute made no express provision for the payment of such expense. It was held, considering the whole statute and its purpose, that there was no intent to change the law in this respect and the counties were held liable as before.⁹⁴ A Connecticut

Pac. 938; *Noyes v. Marston*, 70 N. H. 7, 47 Atl. 592; *Cortesy v. Territory*, 7 N. M. 89, 32 Pac. 504; *Collins v. Millen*, 57 Ohio St. 289, 48 N. E. 1097; *Chisholm v. Shields*, 21 Ohio C. C. 231; *Braun v. State*, 40 Tex. Crim. App. 236, 49 S. W. 620; *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165; *Logan v. United States*, 144 U. S. 263, 12 S. C. Rep. 617, 36 L. Ed. 429; *Mackey v. Miller*, 126 Fed. 161, — C. C. A. —. See *Hamilton v. Rathbone*, 175 U. S. 414, 20 S. C. Rep. 155, 44 L. Ed.

219, where it is held that if a revision is clear and unambiguous the court cannot look to the former statutes for the purpose of creating an ambiguity and then proceed to resolve the ambiguity by considering both the old and the new forms.

⁹² *State v. Dotson*, 26 Mont. 305, 67 Pac. 938.

⁹³ *Cortesy v. Territory*, 7 N. M. 89, 32 Pac. 504.

⁹⁴ *Wisconsin Industrial School v. Clark County*, 103 Wis. 651, 79 N. W. 422.

statute of 1849 provided that additional land might be condemned to enlarge a cemetery when the parties could not agree. In the revision of 1875 this was changed to read that the owner of any cemetery who wishes to enlarge its limits by adding land, the title to which he cannot otherwise acquire, may prefer a complaint for liberty to take the same. It was claimed that under the change of phraseology that land could not be condemned if it could be purchased at any price, but the court held that there was no intent to make a substantial change in sense, and that the statute still meant that the land could be condemned if the parties could not agree.⁹⁵ The court says: "Whether, when a change is made in the language of a statute, a change of meaning is also intended, must depend largely upon the facts and circumstances of each particular case. The change in words may be the effect or result of many causes other than an intent to change the meaning of the law." And the supreme court of Maine says: "A change of language in the revision of general statutes does not necessarily, nor even presumptively, indicate a change of legislative will. The desire for greater conciseness or simplicity of language will usually account for the change or omission of words."⁹⁶ But where a new clause is added in a revision which plainly changes and qualifies the former meaning of the statute, its operation is not affected by the fact that it was introduced in the course of a general revision.⁹⁷

§ 403. **Re-enacted statutes and parts of statutes.**— In the interpretation of re-enacted statutes the court will follow the construction which they received when previously in force. The legislature will be presumed to know the effect which such statutes originally had, and by re-enactment to

⁹⁵ *Westfield Cem. Ass'n v. Darrielson*, 62 Conn. 319, 26 Atl. 345.

⁹⁶ *St. George v. Rockland*, 89 Me. 43, 45, 35 Atl. 1033. "It is not to be inferred that congress in revising and consolidating the statutes intended to change their effect un-

less an intention to do so is clearly expressed." *Logan v. United States*, 144 U. S. 263, 12 S. C. Rep. 617, 36 L. Ed. 429.

⁹⁷ *Collins v. Millen*, 57 Ohio St. 289, 48 N. E. 1097.

intend that they should again have the same effect.⁹⁸ The same rule applies to the readoption of a constitutional provision.⁹⁹ It is not necessary that a statute should be re-enacted in identical words in order that the rule may apply. It is sufficient if it is re-enacted in substantially the same words.¹ The same principle applies when a statutory provision is taken from a constitutional provision which has been construed.² The rule has been held to apply to the re-enactment of a statute which has received a practical construction on the part of those who are called upon to execute it.³

⁹⁸ *O'Byrnes v. State*, 51 Ala. 25; *Roundtree, Ex parte*, id. 42; *Posey v. Pressley*, 60 id. 243; *State v. Brewer*, 23 La. Ann. 274; *Huddleston v. Askey*, 56 Ala. 218; *McKee v. McKee*, 17 Md. 352; *Jenkins v. Ewin*, 8 Heisk. 456; *Morrison v. Stevenson*, 69 Ala. 448; *Matthews, Ex parte*, 52 id. 51; *Woolsey v. Cade*, 54 id. 378; *Harrington v. Smith*, 28 Wis. 43; *Barneswall v. Murrell*, 108 Ala. 366, 18 So. 831; *In re Li Po Tai*, 108 Cal. 484, 41 Pac. 486; *Harvey v. Traveler's Ins. Co.*, 18 Colo. 354, 32 Pac. 935; *Fitzpatrick v. Chicago, etc. Ry. Co.*, 139 Ill. 248, 28 N. E. 837; *Kirby v. Runals*, 140 Ill. 289, 29 N. E. 697; *Catlett v. Young*, 143 Ill. 74, 32 N. E. 447; *Hilliker v. Citizens' St. Ry. Co.*, 152 Ind. 86, 52 N. E. 607; *Board of Commissioners v. Conner*, 155 Ind. 484, 58 N. E. 828; *Shotwell v. Covington*, 69 Miss. 735, 12 So. 260; *Saunders v. St. Louis & N. O. Anchor Line*, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390; *Northcutt v. Eager*, 132 Mo. 265, 33 S. W. 1125; *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555; *State v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; *Collins v. Wilhot*, 35 Mo. App. 585; *Parsons*

v. Durham, 70 N. H. 44, 45, 47 Atl. 600; *State v. Camden*, 58 N. J. L. 575, 33 Atl. 846; *Pultzer v. New York*, 48 App. Div. 6, 62 N. Y. S. 587; *Sproul v. Murray*, 156 Pa. St. 293, 27 Atl. 302; *Guarantee Trust Co. v. Loughlin*, 2 Pa. Co. Ct. 591; *Johnson v. Hariscom*, 90 Tex. 321, 38 S. W. 761; *Cooper v. Yoakum*, 91 Tex. 391, 43 S. W. 871; *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364; *Fisk v. Henarie*, 142 U. S. 459, 12 S. C. Rep. 207, 35 L. Ed. 1080; *Sessions v. Romadka*, 145 U. S. 29, 12 S. C. Rep. 799, 36 L. Ed. 609; *In re Guggenheim Smelting Co.*, 121 Fed. 153.

⁹⁹ *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644.

¹ *Barrett's Appeal*, 73 Conn. 288, 47 Atl. 243; *Grier v. State*, 103 Ga. 428, 30 S. E. 255; *Kelly v. Northern Trust Co.*, 190 Ill. 401, 60 N. E. 585; *McGann v. People*, 194 Ill. 526, 62 N. E. 941; *Breckenridge v. Commonwealth*, 97 Ky. 267, 30 S. W. 634; *Wetherbee v. Roots*, 72 Miss. 355, 16 So. 902; *State v. Cornell*, 54 Neb. 647, 75 N. W. 25.

² *State v. Camden*, 58 N. J. L. 515, 33 Atl. 846.

³ *Bloxham v. Consumers' Electric*

The supreme court of Nebraska says: "Where the legislature in framing an act resorts to language similar in its import to the language of other acts which have received a practical construction by the executive departments and by the legislature itself, it is fair to presume that the language was used in the later act with a view to the construction so given the earlier."⁴ In order that re-enactment should have this effect the practical construction must be an allowable one, and doubtless would have to be in a matter so important or be so long continued that the legislature would presumably have knowledge of it.

Where a statute is amended and re-enacted as amended, the words and provisions re-enacted without change do not necessarily have the same meaning which was before placed upon them by the courts. The amendments made may require a modification of such construction. An act gave a lien for the wages of any mechanic, miner, laborer or clerk due "from any person or persons or chartered company employing clerks, miners, mechanics or laborers, either as owners, lessees, contractors or under-owners of any *works, mines or manufactory or other business* where clerks, miners or mechanics are employed." The words "other business" in the italics were construed to mean other business *like* that expressed by works, mines and manufactory. Subsequently the act was amended by enumerating many other classes of employees, twenty-three in all, including such as servant girls, washerwomen and the like, but the clause quoted referring to employers was left unchanged. It was held that it must receive an enlarged construction to correspond with the new classes of employees enumerated.⁵

Lt. & St. R. R. Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Commonwealth v. Grand Central B. & L. Ass'n, 97 Ky. 325, 30 S. W. 626.

⁴State v. Moore, 50 Neb. 88, 69 N. W. 373, 61 Am. St. Rep. 538.

⁵Sproul v. Murray, 156 Pa. St.

293, 27 Atl. 302. The court says: "Having thus, however, enlarged the class of employees, the act fails to enlarge the class of employers in express terms, and describes them in the same terms as the previous act. But unless the class of employers is also enlarged, we not

Ordinarily the mere re-enactment of a statute does not change its meaning or construction.⁶ Thus the words "now" or "now existing" in a re-enacted statute refer to the time of the original enactment.⁷ The language of an act which, by its title, related to union labels only, was broad enough to include other labels. When afterwards incorporated into the code, without the title, it was held to have the same limited meaning and application as before.⁸ An act of Minnesota passed in 1878 requiring saloons to close at eleven o'clock P. M. was re-enacted in 1889. Standard time came into use in 1883, and was in universal use in the state long before 1889. It was held that the re-enacted statute referred to standard time.⁹ The court says: "We are not unmindful of the general canons of construction that when a statute is amended 'so as to read as follows,' the provisions of the original statute retained in the amendatory act are to be deemed as having been in force all the time, and that words used in an amendatory statute are presumed to be used in the same sense in which they were used in the original. But to this latter rule there are exceptions, or rather cases that do not fall within it, and this, we think, is one of them."

§ 404. Statutes adopted from other states or jurisdictions.—When a statute is adopted from another state or country and such statute has previously been construed by

only defeat the plain general intent of the act, but are driven to the absurdity that servant girls in private families, milliners, seamstresses employed by merchant tailors, etc., are only entitled to preference for their wages when they are employed by the owners of works, mines or manufactories. To avoid this result we must hold that the class of employers is enlarged by necessary implication to correspond with the classes of employees named, and that the words 'other business' in the act include all

kinds of business in which any of the classes of employers named in the act are engaged."

⁶ *Balch v. Johnson*, 106 Tenn. 249, 61 S. W. 289; *Washington & G. R. R. Co. v. Harmon*, 147 U. S. 571, 13 S. C. Rep. 557, 37 L. Ed. 284.

⁷ *Fischer v. Simon*, 95 Tex. 234, 66 S. W. 447; *Barrows v. Peoples' Gas Light & C. Co.*, 75 Fed. 794.

⁸ *Comer v. State*, 103 Ga. 69, 29 S. E. 501.

⁹ *State v. Johnson*, 74 Minn. 381, 77 N. W. 293.

the courts of such state or country, the statute is deemed, as a general rule, to have been adopted with the construction so given to it.¹⁰ The same rule applies to the adop-

- ¹⁰ *Morgan v. Davenport*, 60 Tex. 230; *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582; *Trigg v. State*, 49 Tex. 645; *Snoddy v. Cage*, 5 id. 106; *Brothers v. Mundell*, 60 id. 240; *Hess v. Pegg*, 7 Nev. 23; *Carney v. Hampton*, 3 T. B. Mon. 231; *Botanico-Med. College v. Atchison*, 41 Miss. 188; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *Leonard v. Columbia N. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Marqueze v. Caldwell*, 48 Miss. 23; *Ingraham v. Regan*, 23 id. 213; *Parramore v. Taylor*, 11 Gratt. 242; *People v. Irvin*, 21 Wend. 128; *Kirkpatrick v. Gibson*, 2 Brock. 388; *Harrison v. Sager*, 27 Mich. 476; *Daniels v. Clegg*, 28 id. 32; *Greiner v. Klein*, id. 17; *Attorney-General v. Brunst*, 3 Wis. 787; *Pike's Estate*, 45 id. 391; *Duval v. Hunt*, 34 Fla. 85, 15 So. 876; *Florida Central & P. R. R. Co. v. Mooney*, 40 Fla. 17, 24 So. 148; *Hudson v. King*, 23 Ill. App. 118; *Cole v. Bentley*, 26 Ill. App. 260; *Glaubenslee v. Low*, 29 Ill. App. 408; *Lewis v. Lynch*, 61 Ill. App. 476; *Requa v. Graham*, 86 Ill. App. 566; S. C. affirmed, 187 Ill. 67, 58 N. E. 357; *Laporte v. Gamewell Fire Alarm & Tel. Co.*, 146 Ind. 466, 45 N. E. 588, 58 Am. St. Rep. 359; *Webb v. Butler County Com'rs*, 52 Kan. 375, 34 Pac. 973; *Nelson v. Stull*, 65 Kan. 585, 70 Pac. 590; *Ryalls v. Mechanics Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; *State v. Holmes*, 115 Mich. 457, 73 N. W. 548; *Stellwagen v. Pro-*
- bate Judge*, 130 Mich. 166, 89 N. W. 728; *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 962, 32 Am. St. Rep. 656; *St. Louis National Bank v. Hoffman*, 74 Mo. App. 203; *Stephen v. Metzger*, 95 Mo. App. 609, 89 S. W. 625; *First National Bank v. Bell Silver, etc. Co.*, 8 Mont. 32, 19 Pac. 402; *Price v. Lush*, 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467; *Largey v. Chapman*, 18 Mont. 563, 46 Pac. 808; *Stadler v. First Nat. Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582; *Butte & Boston Consol. Min. Co. v. Montana Ore Purchasing Co.*, 25 Mont. 41, 63 Pac. 825; *Coffield v. State*, 44 Neb. 417, 62 N. W. 875; *Forrester v. Kearney Nat. Bank*, 49 Neb. 655, 68 N. W. 942; *Kendall v. Garneau*, 55 Neb. 403, 75 N. W. 852; *State v. McBride*, 64 Neb. 547, 90 N. W. 209; *Reymond v. Newcomb*, 10 N. M. 151, — Pac. —; *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241; *Chisholm v. Weisse*, 2 Okl. 611, 39 Pac. 467; *United States v. Choctaw, etc. R. R. Co.*, 3 Okl. 404, 41 Pac. 729; *Barnes v. Lynch*, 9 Okl. 156, 59 Pac. 995; *Barmore v. State Board*, 21 Ore. 301, 28 Pac. 8; *Everding v. McGinn*, 23 Ore. 15, 35 Pac. 178; *In re O'Connor*, 21 R. I. 465, 44 Atl. 591, 79 Am. St. Rep. 814; *People v. Ritchie*, 12 Utah, 180, 42 Pac. 209; *Norfolk & W. Ry. Co. v. Old Dominion Baggage Co.*, 99 Va. 111, 37 S. E. 784; *Pomeroy v. Pomeroy*, 93 Wis. 262, 67 N. W. 430; *Willis v. Eastern Trust & B. Co.*, 169 U. S. 295, 18 S. C. Rep. 347, 42 L. Ed. 752;

tion of a constitutional provision from another state.¹¹ So when congress adopts a state statute for the District of Columbia.¹² Where the foreign statute is mainly adopted, though not entirely and unchanged, the prior decisions of the foreign court are held to be entitled to great weight.¹³ Congress extended certain laws of Arkansas over the Indian territory, and it was held that the construction previously placed upon them by the supreme court of Arkansas should be followed.¹⁴ Decisions rendered after the adoption have only a persuasive force.¹⁵ In *Young v. Salt Lake City*,¹⁶ it was held that where a statute was adopted from another state, a decision of the latter state holding the statute constitutional was entitled to great weight, where the constitutional provisions of the two states are the same.

The general rule does not apply when the construction of the foreign court is not in harmony with the constitution, laws or policy of the state making the adoption.¹⁷ So if

James v. Appel, 192 U. S. 129; *Peterson v. Northern Pac. Ry. Co.*, 105 Fed. 335; *Blaylock v. Muskogee*, 117 Fed. 125, 54 C. C. A. 639; *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 123 Fed. 232.

¹¹ *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 25; *Brown v. Walker*, 161 U. S. 591, 16 S. C. Rep. 644, 40 L. Ed. 819.

¹² *Strasburger v. Dodge*, 12 App. Cas. (D. C.) 37; *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 S. C. Rep. 580, 43 L. Ed. 873.

¹³ *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649.

¹⁴ *Robinson v. Belt*, 187 U. S. 41, 23 S. C. Rep. 16; *Sanger v. Flow*, 48 Fed. 152, 1 C. C. A. 56, 4 U. S. App. 32; *Robinson v. Belt*, 2 Ind. Ter. 360, 51 S. W. 975.

¹⁵ *Harrison v. Hill*, 37 Ill. App. 30; *Northcutt v. Eager*, 132 Mo. 265, 33 S. W. 1125; *Myers v. McGavock*, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627; *Olin v. Denver & R. G. R. Co.*, 25 Colo. 177, 53 Pac. 454.

¹⁶ 24 Utah, 321, 67 Pac. 1066.

¹⁷ *Duval v. Hunt*, 34 Fla. 85, 15 So. 876; *Florida Central & P. R. Co. v. Mooney*, 40 Fla. 17, 24 So. 148; *Lewis v. Lynch*, 61 Ill. App. 476; *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656; *Bowen v. Smith*, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491; *St. Louis Nat. Bank v. Hoffman*, 74 Mo. App. 203; *Finlen v. Heinze*, 28 Mont. 548; *Whitney v. Fox*, 166 U. S. 637, 17 S. C. Rep. 713, 41 L. Ed. 1145; *Oleson v. Wilson*, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639; *Morgan v. State*, 51 Neb. 672, 71 N. W. 788.

the statute as adopted is materially changed,¹⁸ or put in a different connection or setting.¹⁹

Where the construction of the foreign state was deemed erroneous and was overruled after the adoption, the courts of the adopting state declined to follow such overruled decisions.²⁰ It is held that the general rule should not be departed from except for the strongest reasons.²¹ In *Blaylock v. Muskogee*,²² the court followed the rule though deeming the construction of the adopted statute an unreasonable one.

The supreme court of Minnesota, in a case in which the general rule was not followed, says: "There exists, notwithstanding the many adjudications in point, some diversity of opinion respecting the effect of constructions placed upon statutes previous to their adoption in other jurisdictions. Such a construction, it is sometimes said, becomes, upon the enactment of a statute by another state, an integral part of the act itself, having the force and effect of a legislative command. However, the more rational view, and the one sanctioned by authority, is that, except as applied to English statutes in force in this country at the time of the war of the revolution, the effect of such previous construction is the same as of decisions by courts of last resort having jurisdiction of the particular controversy."²³ The Ohio case must, therefore, be regarded as a construction of the statute, to be ignored or rejected only for reasons which require the overruling thereof had the decision been pronounced by this court, and in that light it will now be examined."²⁴

¹⁸ *Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834; *Rhea v. State*, 63 Neb. 461, 88 N. W. 789; *Swofford Bros. Dry Goods Co. v. Mills*, 86 Fed. 556. *Pac.* 584, 87 Am. St. Rep. 953; *Dwyer v. Smelter City State Bank*, 30 Colo. 315.

¹⁹ *Frankel v. Creditors*, 20 Nev. 49, 14 Pac. 588, 775; *Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834. ²¹ *Stadler v. First Nat. Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582.

²⁰ *Oleson v. Wilson*, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639; ²² 117 Fed. 125, 54 C. C. A. 639. ²³ Citing *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120.

Coad v. Cowhick, 9 Wyo. 316, 63 ²⁴ *Morgan v. State*, 51 Neb. 672,

Where a section of a statute was taken from a decision of the supreme court of the state, it was presumed that the general assembly in adopting it intended to adopt the principle of law announced in the decision from which it was taken.²⁵ In construing a body of statutes enacted by a new territory and adopted largely from other states, the court said: "While it may be accepted as a part of the history of the statutes of 1893, that different portions of them were adopted without material alteration from the statutes of different states, and their different portions are not, in all respects, consistent with each other, it is yet the duty of the court to endeavor to reconcile them wherever it is possible so to do, in order that the legislative intent may be, as far as possible, effective, and to support the theory as fully as may be done, that as a body of revised laws adopted at the same time they are of equal force and effect, and all intended to stand with as little interference as possible of judicial interpretation. And that it is the duty of courts to endeavor to harmonize the various portions of the statutes with one another. One part of the statute will not be allowed to defeat another, if by any reasonable construction the two can be made to stand together."²⁶

§ 405 (257). **Statutes which adopt other statutes by particular or general reference.**—Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute.²⁷ When so adopted, only such portion is in force as relates to the particular subject of the adopting act, and as

71 N. W. 788. In *Stackpole v. Halahan*, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502, the court, referring to the Australian ballot law, said:

"We are of opinion that an election law imported from a monarchy to a republic should therefore not be subjected strictly to the rule that the importation of a statute imports also its construction."

²⁵ *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630.

²⁶ *Dunham v. Linderman*, 10 Okl. 570, 64 Pac. 15.

²⁷ *Phoenix Ass. Co. v. Fire Depart-*

is applicable and appropriate thereto.²⁸ Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent.²⁹ Nor will the repeal of the statute so adopted affect its operation as part of the statute adopting it.³⁰ The effect may be thus comprehensively stated: Where a statute is incorporated in another, the effect is the same as if the provisions of the former were re-enacted in the latter, for all the purposes of the latter statute; and the repeal of the former statute does not repeal its provisions so far as they have been incorporated in an act which is not repealed, where the adoption was for the purpose of providing for a subject-matter not within the original statute.³¹ "It is a sound rule of construction," said Lord Denman, C. J., . . . "applicable to modern as well as ancient statutes, perhaps even more so from necessity in consequence of the looseness of

ment, 117 Ala. 631, 23 So. 843, 42 L. R. A. 468; *Farbish v. County Commissioners*, 93 Me. 117, 44 Atl. 364; *Gaston v. Lamkin*, 115 Mo. 20, 21 S. W. 1100; *Greenfield Avenue*, 191 Pa. St. 290, 43 Atl. 290; *Court of Insolvency v. Melden*, 69 Vt. 510, 38 Atl. 167.

²⁸ *Jones v. Dexter*, 8 Fla. 270; *Matthew v. Sands*, 29 Ala. 136; *Womelsdorf Abbey*, 8 Pa. Co. Ct. 207.

²⁹ *Darmstaetter v. Moloney*, 45 Mich. 621, 8 N. W. 574; *Schlaudecker v. Marshall*, 72 Pa. St. 200; *United States v. Paul*, 6 Pet. 141, 8 L. Ed. 348; *Kendall v. United States*, 12 Pet. 524, 10 L. Ed. 317; *Nunes v. Wellisch*, 12 Bush, 363; *In re Com'rs of Lunatic Asylums*, 8 Irish Rep., Eq. series, 366; *Knapp v. Brooklyn*, 97 N. Y. 520; *Re Main St.*, 98 id. 454; *State v. Davis*, 22 La. Ann. 77; *Allen, Ball & Co. v. Mayor*, 9 Ga. 286; *Ramish v. Hartwell*, 126

Cal. 443, 58 Pac. 920; *Culver v. People*, 161 Ill. 89, 43 N. E. 812; *Charleston v. Johnston*, 170 Ill. 336, 48 N. E. 985; *Cicero v. McCarthy*, 172 Ill. 279, 50 N. E. 188; *Farbish v. County Commissioners*, 93 Me. 117, 44 Atl. 364; *Court of Insolvency v. Melden*, 69 Vt. 510, 38 Atl. 167; *Postal Tel. Cable Co. v. Southern Ry. Co.*, 89 Fed. 190.

³⁰ *Phoenix Ass. Co. v. Fire Department*, 117 Ala. 631, 23 So. 843, 42 L. R. A. 468; *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920; *Shull v. Barton*, 58 Neb. 741, 79 N. W. 732; *Wick v. Fort Plain. etc. R. R. Co.*, 27 App. Div. 577, 50 N. Y. S. 479; *People v. Webster*, 8 Misc. 1133, 28 N. Y. S. 646; *In re Heath*, 144 U. S. 92, 12 S. C. Rep. 615, 36 L. Ed. 358; *Clarke v. Bradlaugh*, L. R. 7 Q. B. Div. 69.

³¹ *In re Com'rs of Lunatic Asylums*, 8 Irish Rep., Eq. series, 366; *Reg. v. Stock*, 8 Ad. & E. 405.

expression which now prevails, that 'in construction of general references in acts of parliament, such reference must be made as will stand with reason and right.'"³² In deciding whether the words of reference are to be understood in the largest or in the narrowest sense, whether they extend to the whole or to a part only of any act, the court considers the subject-matter of the section in which such words are found, and contrasts it with that of the preceding sections.³³ Thus, where a section which dealt with a new subject used the words "nothing hereinbefore contained," it was held that the reference was confined to matters contained in that section and did not extend to earlier portions of the act.³⁴ The provisions of a repealed act may be adopted, with the same effect as if it was in force.³⁵

There is another form of adoption wherein the reference is, not to any particular statute or part of a statute, but to the law generally which governs a particular subject. The reference in such case means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied.³⁶ The supreme court of Illinois says: "Where, however, the adopting statute makes no reference to any particular act by its title or otherwise, but refers to the general law regulating the subject in hand, the reference will be regarded as including, not only the law in force at the date of the adopting act, but also the law in force when action is taken, or proceedings are resorted to."³⁷

³² Reg. v. Badcock, 6 Q. B. 787, at p. 797.

³³ Wilb. on St. 187.

³⁴ Id.; In re Cambrian Ry. Co.'s Scheme, L. R. 3 Ch. 278.

³⁵ People v. Glassco, 203 Ill. 353, 67 N. E. 499.

³⁶ Culver v. People, 161 Ill. 89, 43 N. E. 812; Cole v. Circuit Judge, 106 Mich. 692, 64 N. W. 741; Gaston v. Lamkin, 115 Mo. 20, 21 S. W. 1100; St. Louis v. R. J. Gunning Co., 138 Mo. 347, 39 S. W. 788; Newman v.

North Yakima, 7 Wash. 220, 34 Pac. 921; Ford v. Durie, 8 Wash. 87, 35 Pac. 595; School District v. Fairchild, 10 Wash. 198, 38 Pac. 1029; State v. Parker, 12 Wash. 685, 42 Pac. 113.

³⁷ Culver v. People, 161 Ill. 89, 97, 43 N. E. 812. And the supreme court of Missouri, sitting *en banc*, says: "But when the subsequent statute, being a general one, does not refer specifically to a former statute for the rule of procedure to be followed, but generally to the

§ 406. Examples of the two modes of adoption.—An act in regard to parks provided that the proceedings in special assessment cases, subsequent to the petition, should conform, as near as may be, to the provisions of article IX of "An act for the incorporation of cities and villages," approved April 10, 1872. This was held to adopt the act as it existed at the time of adoption and not to include subsequent amendments.³⁸ A statute imposed municipal taxes on specified privileges, and then provided "that there is hereby assessed on all privileges not herein specifically enumerated a tax equal to the tax assessed for state purposes, the same to be collected as other privileges are collected." This was held to embrace only such privileges as were taxed at the passage of the act and not such as were subsequently taxed for the first time.³⁹

A statute provided that appeals might be taken in the same manner as from justices of the peace. This was held to mean as the statutes existed from time to time, the intent being to furnish a rule for future conduct, "always to be found when it is needed by reference to the law existing at the time when the rule is invoked."⁴⁰ So where an act contained this provision: "The election herein provided for shall be held and conducted in the same manner, and the

established law, by some such expression as 'the same as is provided for by law' in given cases, then the act becomes a rule for future conduct to be found when needed by reference to the law governing such cases at the time when the rule is invoked." *Gaston v. Lamkin*, 115 Mo. 20, 33, 21 S. W. 1100.

³⁸ *Culver v. People*, 161 Ill. 89, 43 N. E. 812. Where an ordinance for a local improvement required it to be made in accordance with the act for the incorporation of cities and villages approved April 10, 1872, it was held to refer to the act

as previously amended, that is, to include amendments up to the time the ordinance was passed. *Steele v. River Forest*, 141 Ill. 302, 30 N. E. 1034.

³⁹ *Memphis v. Bing*, 94 Tenn. 644, 30 S. W. 745. For further examples of this sort see *Andel v. People*, 106 Ill. App. 558; *Postal Tel. Cable Co. v. Southern Ry. Co.*, 89 Fed. 190; and cases cited in last section.

⁴⁰ *Cole v. Circuit Judge*, 106 Mich. 692, 64 N. W. 741; *St. Louis v. R. J. Gunning Co.*, 138 Mo. 347, 39 S. W. 788.

returns thereof made to the county clerk and the vote counted, in all respects the same as in elections for state and county officers, as far as the laws in relation thereto are applicable.”⁴¹ A city charter provided that the levy and collection of city taxes should be done in accordance *with the existing general laws on the subject*. This was held not to make such laws a part of the charter as they existed when the charter was enacted, but to mean the general law in existence when the taxes were levied and collected.⁴²

§ 407. **Construction and effect of acts adopting other acts in particular cases.**—A drainage law provided that the drainage taxes should be collected in the same manner as the general taxes. This was held not to adopt the penalty of one per cent. a month for non-payment after a specified date.⁴³ Where the charter of a corporation made it subject to all the liabilities imposed upon corporations organized under the general law, it was held not to adopt a provision making officers liable for the debts of the corporation in certain contingencies.⁴⁴ The grant to one corporation of all the rights, powers and privileges conferred upon another was held not to grant an exemption from taxation conferred upon the latter.⁴⁵ An act provided that “every person charged with an offense shall be tried in the county wherein it shall have been committed, except when it is otherwise provided.” Held to mean otherwise provided by statute, not by the common law or statute.⁴⁶ A statute which provided that a certain notice should be served in *like manner* as a summons in civil actions was held to refer to the mode of service and not to require the

⁴¹ *Gaston v. Lamkin*, 115 Mo. 20, 21 S. W. 1100.

⁴² *Newman v. North Yakima*, 7 Wash. 220, 34 Pac. 921.

⁴³ *Jackson Fire Clay, etc. Co. v. Snyder*, 93 Mich. 325, 53 N. W. 359. And see *Murphy v. People*, 120 Ill. 234, 11 N. E. 202.

⁴⁴ *Park Bank v. Remsen*, 158 U. S. 337, 15 S. C. Rep. 891, 39 L. Ed. 1008.

⁴⁵ *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75; *State v. Mercantile Bank*, 95 Tenn. 212, 31 S. W. 989.

⁴⁶ *State v. Meehan*, 62 Conn. 126, 25 Atl. 476.

service to be made by an officer.⁴⁷ An act of congress in regard to the condemnation of property by the United States conferred jurisdiction upon the circuit and district courts and provided that the practice, pleadings, forms and mode of procedure should *conform as near as may be* to the practice, etc., in like causes in the courts of the state wherein the circuit and district courts were held. The italics were held to mean as near as practicable, not as near as possible, and that the court was the judge of the matter.⁴⁸ A statute provided that certain proceedings should be the same as provided in sections 3815 to 3821. Section 3821 was the only one which gave an appeal, and it was held that, while the word "to" is ordinarily a word of exclusion, yet in this case it should be construed as inclusive.⁴⁹ An act creating a charitable corporation provided that it should be subject to the provisions of title 7, part 1, chapter 18, of the Revised Statutes in relation to devises and bequests by will. Chapter 18 of the official Revised Statutes contained no such provisions. But there was in use an unofficial edition of the Revised Statutes, frequently cited by the courts and lawyers as the Revised Statutes, which contained a title 7, part 1, chapter 18, on the subject in question. The court took judicial notice of these facts and held that the unofficial edition was intended by the act and applied the title referred to, to defeat a bequest to the corporation.⁵⁰

§ 408 (258). **Interpretation with reference to grammatical sense.**—Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different. In other words, it is presumed that the writer intended to be understood according to the gram-

⁴⁷ Kirkpatrick v. Lewis, 46 Minn. 164, 47 S. W. 970.

⁴⁸ Chappell v. United States, 81 Fed. 764, 26 C. C. A. 600.

⁴⁹ Littleton Bridge Co. v. Pike, 73 Vt. 7, 47 Atl. 108.

⁵⁰ Matter of Will of Kavanagh, 125 N. Y. 418, 26 N. E. 470. See Matter of Norton, 39 App. Div. 369, 57 N. Y. S. 407.

matical purport of the language he has employed to express his meaning.⁵¹ This presumption gives way when it appears from a perusal of the context or the whole statute that the legislature did not grammatically express its intention.⁵² It is only one rule of interpretation to follow the grammatical sense when it does not appear to conflict with the true intent.⁵³ A statute entitled a man to be registered as a voter who, on or before a certain date, has paid "all poor rates that have become payable by him up to another earlier day." It appeared that the person in question had paid all the rates of the current year, but had been excused, on account of poverty, from paying a rate that had been payable in the preceding year. The argument against his right to be registered, based on the strict grammatical sense, was adopted. "No doubt," said Willes, J., "the general rule is that the language of an act is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnance or injustice. . . . But I utterly repudiate the notion that it is competent to a judge to modify the language of an act in order to bring it in accordance with his views of what is right or reasonable."⁵⁴ Jarvis, C. J., says that it is the golden rule of construction "to give to words used by the legislature their plain and natural meaning, unless it is manifest from the general scope and intention of the statute that injustice and absurdity would result from so construing them."⁵⁵ Burton, J.,

⁵¹ *Dame's Appeal*, 63 Pa. St. 417, 422; *Macdougall v. Paterson*, 11 C. B. 755, 769; *Warburton v. Loveland*, 1 Hudson & Brooke, 648; *Becke v. Smith*, 2 M. & W. 191; *Everett v. Wells*, 2 Man. & Gr. 269; *Richards v. McBride*, L. R. 8 Q. B. Div. 119; *Smith v. Bell*, 10 M. & W. 378; *Cull v. Austin*, L. R. 7 C. P. 234; *Att'y-Gen'l v. Lockwood*, 9 M. & W. 398; *Waugh v. Middleton*, 8 Ex. 356; *Christopherson v. Lotinga*, 33 L. J. C. P. 123; 15 C. B. (N. S.) 809.

⁵² *George v. Board of Education*, 33 Ga. 344; *Pease v. L. Fish Furn. Co.*, 70 Ill. App. 138; S. C. affirmed, 176 Ill. 220, 52 N. E. 932; *United States v. Cohn*, 2 Ind. Ter. 474, 52 S. W. 38.

⁵³ *Fisher v. Connard*, 100 Pa. St. 63, 69.

⁵⁴ *Abel v. Lee*, L. R. 6 C. P. 371; *Hardc. on St.* 31. See *People v. Hill*, 3 Utah, 334, 3 Pac. 75.

⁵⁵ *Mattison v. Hart*, 14 C. B. 385.

in *Warburton v. Loveland*,⁵⁵ probably states the principle correctly and comprehensively with the accepted qualifications: "I apprehend it is a rule in the construction of statutes that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to or inconsistent with any expressed intention, or any declared purpose of the statute; or if it would involve any absurdity, repugnance or inconsistency in its different provisions, the grammatical sense must then be modified, extended or abridged so far as to avoid such inconvenience, but no farther."⁵⁷

§ 409 (259). It is better always to adhere to a plain, common-sense interpretation of the words of a statute than to apply to them a refined and technical grammatical construction.⁵⁸ It is not always safe to assume that the draftsman of an act understood the rules of grammar.⁵⁹ Neither bad grammar nor bad language will vitiate a statute.⁶⁰ The act of 24 and 25 Vict., ch. 109, secs. 24 and 25, enacts that "Any person acting in contravention of this section shall forfeit all fish taken by him, *and any net used by him in taking the same.*" In a case in which no fish had been caught the grammatical sense was insisted upon as the true sense, and that there was no forfeiture of the net; but the court construed the words, "used by them in taking the same," to mean "used for the purpose of taking the same."⁶¹ A relative word will not be read as representing the last antecedent exclusively, where the sense of the context and clear intention of the law-maker requires it to represent several or one more remote.⁶² The grammatical rule, which is also

⁵⁵ 1 Hudson & Brooke, 648.

⁵⁷ *Becke v. Smith*, 2 M. & W. 191; *King v. Pease*, 4 B. & Ad. 30, 40; *Eyeston v. Studd*, 2 Plow. 463.

⁵⁸ *Gyger's Estate*, 65 Pa. St. 311; *Williams v. Evans*, L. R. 1 Ex. Div. 277; *Miller v. Salomons*, 7 Ex. 553.

⁵⁹ *Fisher v. Connard*, 100 Pa. St. 63, 69.

⁶⁰ *Kelly v. McGuire*, 15 Ark. 555;

Drennen v. Banks, 80 Md. 310, 30 Atl. 655; *Ancona v. Becker*, 3 Pa. Dist. 86.

⁶¹ *Ruther v. Harris*, L. R. 1 Ex. Div. 97.

⁶² *Fisher v. Connard*, *supra*; *Gyger's Estate*, 65 Pa. St. 311; *State v. Jernigan*, 3 Murph. 18; *Simpson v. Robert*, 35 Ga. 180.

the legal rule, in construing statutes, was held to be that, where general words occur at the end of a sentence, they refer to and qualify the whole; while, if they are in the middle of a sentence, and sensibly apply to a particular branch of it, they are not to be extended to that which follows.⁶³ The words "whilst on duty" fixed the scope and operation of all the clauses of the following provision: "No person holding office under this act shall be liable to military or jury duty, *nor* to arrest upon civil process, or to service of subpoenas from civil courts whilst actually on duty;"⁶⁴ and the same effect was given to it after amendment by substituting *or* for *nor* where italicised.⁶⁵ An act expressed in words of the future tense may still show an intent to have a present effect. Thus, an act declaring "that twenty-five thousand acres of land shall be allowed for and given to Major-General Nathaniel Green" was held to be an absolute donation, to be consummated by the allotment provided for therein. "Given when?" says Chief Justice Marshall, interrogatively. "The answer is unavoidable: when they shall be allotted. Given how? Not by any future act; for it is not the practice of legislation to enact that a law shall be passed by some future legislature; but given by force of this act."⁶⁶

§ 410 (260). Mistakes — Their correction and effect. — Legislative enactments are not any more than any other writings to be defeated on account of mistakes, errors or omissions, provided the intention of the legislature can be collected from the whole statute;⁶⁷ and the title and pre-

⁶³ *Rex v. Inhabitants of Shipton*, 8 B. & C. 94; *Dwar. on St.* 703. So. 857; *State v. Deuel*, 63 Kan. 811, 66 Pac. 1037; *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258; *Loper v. State*, 82 Minn. 71, 84 N. W. 650; *State v. County Com'rs*, 87 Minn. 325, 92 N. W. 216; *Home B. & L. Ass'n v. Nolan*, 21 Mont. 205, 53 Pac. 738; *State v. Morehouse*, 5 N. D. 406, 67 N. W. 140; *State v. Robinson*, 32 Ore. 43, 48 Pac. 357; *Howlett v. Cheetham*, 17 Wash. 626, 50 Pac. 522; *Unite*

⁶⁴ *Hart v. Kennedy*, 14 Abb. Pr. 432; on appeal, 15 id. 290.

⁶⁵ *Coxson v. Dolan*, 2 Daly, 66.

⁶⁶ *Rutherford v. Green's Heirs*, 2 Wheat. 196, 198, 4 L. Ed. 218. See *Ludington v. United States*, 15 Ct. of Cl. 453; *Maysville, etc. R. R. Co. v. Herrick*, 13 Bush, 122, 125.

⁶⁷ *Harper v. State*, 109 Ala. 28, 19

amble may be referred to for this purpose.⁶⁸ Where a law possessing all the requisites of a valid statute is passed, containing clear requirements capable of being carried into effect, in connection with other statutes on the same subject, a mistaken reference to them will not defeat the will of the legislature and render it void.⁶⁹ Thus, where an act purporting to be an amendment of another act describes it truly except that it incorrectly states the date, the erroneous statement will be treated as surplusage or corrected by construction.⁷⁰ So references to other sections or statutes incorrectly made will be corrected where the context or other particulars identify the statute or provision intended and enable the court to follow the reference with certainty.⁷¹ Where one word has been erroneously used for another, or

States v. Burr, 159 U. S. 78, 15 S. C. Rep. 1002, 40 L. Ed. 82; *Ex parte Robinson*, 28 Tex. Ct. App. 511, 13 S.W. 786. In *State v. County Com'rs*, 87 Minn. 325, 337, 92 N. W. 216, the court says: "Statutes are seldom drawn with minute particularity, and unintentional omissions and apparent oversights are supplied by implication and intendment by the courts. In cases of imperfectly drawn statutes, the courts, rather than pronounce them unconstitutional and void, will draw inferences from the evident intent of the legislature, as gathered from the law taken as a whole, supplying technical inaccuracies in expression, and obviously unintentional mistakes and omissions by implication, from the necessity of making them operative and effectual as to specific things which are included in the broad and comprehensive terms and purposes of the law; and these inferences and implications are as much a part of the law as what is distinctly expressed therein." See

also *State v. Chicago, etc. R. R. Co.*, 38 Minn. 281, 37 N. W. 782.

⁶⁸ *Nazro v. Merchants' Mut. Ins. Co.*, 14 Wis. 295; *State v. McCracken*, 42 Tex. 383; *State v. Woolard*, 119 N. C. 779, 25 S. E. 719.

⁶⁹ *Lowell v. Washington County R. R. Co.*, 90 Me. 80, 37 Atl. 869; *State v. Woolard*, 119 N. C. 779, 25 S. E. 719; *State v. Cross*, 44 W. Va. 315, 29 S. E. 527.

⁷⁰ *Madison, etc. P. R. Co. v. Reynolds*, 3 Wis. 287; *School Directors v. School Directors*, 73 Ill. 249; *State v. McCracken*, 42 Tex. 383; *Pue v. Hetzell*, 16 Md. 539; *Poock v. Lafayette Bldg. Ass'n*, 71 Ind. 357; *Harper v. State*, 109 Ala. 28, 19 So. 857; *State v. Woolard*, 119 N. C. 779, 25 S. E. 719. See *Blake v. Brackett*, 47 Me. 28; *Watervliet T. Co. v. McKean*, 6 Hill, 616; *Hicks v. Jamison*, 10 Mo. App. 35.

⁷¹ *Commonwealth v. Marshall*, 69 Pa. St. 332; *Shrewsbury v. Boylston*, 1 Pick. 105; *Bradbury v. Wagenhorst*, 54 Pa. St. 180, 183; *People v. King*, 28 Cal. 265, 273; *People v.*

a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied.⁷² This is but making the strict letter of the statute yield to the obvious intent. So words which are meaning-

Hill, 3 Utah, 334, 3 Pac. 75; Custin v. City of Viroqua, 67 Wis. 314; Murray v. Hobson, 10 Colo. 66, 13 Pac. 921; Winona v. Whipple, 24 Minn. 61; People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508; Gray v. County Commissioners, 83 Me. 429, 23 Atl. 376; People v. Lord, 9 App. Div. 458, 41 N. Y. S. 343; McKee Land & Imp. Co. v. Williams, 63 App. Div. 553, 51 N. Y. S. 399; McKee Land & Imp. Co. v. Swikehard, 23 Misc. 21, 51 N. Y. S. 399.

⁷² Quin v. O'Keeffe, 10 Ir. C. L. (N. S.) 393; People v. Hoffman, 97 Ill. 234; State v. Brandt, 41 Iowa, 593; Hedley, Ex parte, 31 Cal. 108; People v. Sweetser, 1 Dak. 295, 46 N. W. 452; Peck v. Weddell, 17 Ohio St. 271; Palms v. Shawano Co., 61 Wis. 211; Donohue v. Ladd, 31 Minn. 244, 17 N. W. 381; State v. Pool, 74 N. C. 402; Haney v. State, 34 Ark. 263; Turner v. State, 40 Ala. 21; Vance v. Gray, 9 Bush, 656; Rolland v. Commonwealth, 82 Pa. St. 306, 326, 22 Am. Rep. 758; Blemer v. People, 76 Ill. 265; Fowler v. Padget, 7 T. R. 507; Rex v. Mortlake, 6 East, 397; Graham v. Charlotte, etc. R. R. Co., 64 N. C. 631; Commonwealth v. Harris, 13 Allen, 534; Foster v. Commonwealth, 8 Watts & S. 77; Waugh v. Middleton, 8 Ex. 352; Waterford v. Hensley, Mart. & Yerg. (Tenn.) 275; Angele de Sentamanat v. Soule, 33 La. Ann. 609; Hooper v. Birchfield, 115 Ala. 226, 22 So. 68; Edwards v.

Denver & R. G. R. Co., 13 Colo. 59, 21 Pac. 1011; Morris v. People, 4 Colo. App. 136, 35 Pac. 188; Rabun Co. v. Haversham Co., 79 Ga. 248, 5 S. E. 198; Abernathy v. Mitchell, 113 Ga. 127, 38 S. E. 303; Dickson v. Chicago, etc. R. R. Co., 77 Ill. 331; Von Campe v. Chicago, 140 Ill. 361, 29 N. E. 892; People v. Gaulter, 149 Ill. 39, 36 N. E. 576; Indiana, Ill. & Ia. R. R. Co. v. People, 154 Ill. 558, 39 N. E. 133; Comfort v. Kittle, 81 Iowa, 179, 46 N. W. 988; State v. Small, 29 Minn. 216, 12 N. W. 703; State v. Justus, 85 Minn. 279, 88 N. W. 759, 89 Am. St. Rep. 550; Earhart v. State, 67 Miss. 325, 7 So. 347; Haman v. McNamara, 77 Mo. App. 1; Orvil v. Woodcliff, 61 N. J. L. 107, 38 Atl. 685; Baca v. Bernalillo County Com'rs, 10 N. M. 438, — Pac. —; Jones v. Mail & Express Pub. Co., 80 Hun, 368, 30 N. Y. S. 335; Henderson v. Dowd, 116 N. C. 795, 21 S. E. 692; Territory v. Clark, 2 Okl. 82, 35 Pac. 882; Lancaster County v. Lancaster City, 160 Pa. St. 411, 28 Atl. 854; Sener v. Ephrata, 176 Pa. St. 80, 34 Atl. 954; Andrews v. Beane, 15 R. I. 451, 8 Atl. 540; State v. Conley, 22 R. I. 397, 48 Atl. 200; White v. Rio Grande Western Ry. Co., 25 Utah, 346, 71 Pac. 593; Hutchings v. Commercial Bank, 91 Va. 68, 20 S. E. 950; State v. Stellman, 81 Wis. 124, 51 N. W. 260; Stephens v. Cherokee Nation, 174 U. S. 445, 19 S. C. Rep. 722, 43 L. Ed. 1041; *ante*, §§ 382 to 384.

less or inconsistent with the intention otherwise plainly expressed in an act have sometimes been rejected as redundant or surplusage.⁷³ If a condition or qualifying clause has been misplaced, so that in the connection where it is inserted it is absurd or nonsensical, the court will apply it to its proper subject and give it effect if the statute affords the proper clues, and it can be done in furtherance of its obvious intent.⁷⁴ But where the language read in the order of clauses as passed presents no ambiguity, courts will not attempt to qualify it by any transposition of clauses and from what it can be ingeniously argued was a general intent.⁷⁵ Where the provisions of a law are inconsistent and contradictory to each other, or the literal construction of a single section would conflict with every other following or preceding it, and with the entire scope and manifest intent of the act, it is certainly the duty of the courts, if it be possible, to harmonize the various provisions with each other; and to effect this it may be necessary, and is admissible, to depart from the literal construction of one or more sections.⁷⁶

§ 411 (261). To enable the court to insert in a statute omitted words or read it in different words from those found in it, the intent thus to have it read must be plainly deducible from other parts of the statute.⁷⁷ When the de-

⁷³ *United States v. Rossvally*, 3 Ben. 157, Fed. Cas. No. 16,197; *State v. Aucuff*, 6 Mo. 54; *United States v. Stern*, 5 Blatch. 512, Fed. Cas. No. 16,389; *Chapman v. State*, 16 Tex. App. 76; *State v. Beasley*, 5 Mo. 91; *State v. Heman*, 70 Mo. 441; *People v. English*, 139 Ill. 622, 29 N. E. 678; *Gage v. Chicago*, 201 Ill. 93, 66 N. E. 324; *Brook v. Blue Mound*, 61 Kan. 184, 59 Pac. 273; *People v. Taylor*, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287; *McCormick v. West Duluth*, 47 Minn. 272, 50 N. W. 128; *Bingham v. Birmingham*, 103 Mo.

345, 15 S. W. 533; *Paxton & Hershey Irr. Co. v. Farmers' & M. Irr. & L. Co.*, 45 Neb. 884, 64 N. W. 343, 50 Am. St. Rep. 585, 29 L. R. A. 853; *Gusthal v. Strong*, 23 App. Div. 315, 48 N. Y. S. 652.

⁷⁴ *Criswell v. Montana Cent. Ry. Co.*, 17 Mont. 189, 42 Pac. 767; *Starek v. Insurance Co.*, 7 Pa. Co. Ct. 511; *State v. Turnpike Co.*, 16 Ohio St. 308, 320.

⁷⁵ *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869.

⁷⁶ *State v. Heman*, 70 Mo. 441.

⁷⁷ *Fairchild v. Masonic Hall Ass'n*,

scriptive words constitute the very essence of the act, unless the description is so clear and accurate as to refer to the particular subject intended, and be incapable of being applied to any other, the mistake is fatal.⁷⁸ A statute prohibited the sale of liquor "within three miles of Mt. Zion church, in Gaston county." There were two churches of that name in that county, several miles apart. This statute was held

71 Mo. 526, 532; *Hicks v. Jamison*, 10 Mo. App. 35; *Douglass v. Eyre*, Gilp. 147; *De Sentamanat v. Soule*, 33 La. Ann. 609; Reg. v. Phillips, L. R. 1 Q. B. 648; Reg. v. Shiles, 1 Q. B. 919; *Blanchard v. Sprague*, 3 Sumn. 279, Fed. Cas. No. 1517; *Wright v. Frant*, 4 B. & S. 118; *Lane v. Schomp*, 20 N. J. Eq. 82; *Ford v. Ford*, 143 Mass. 577, 10 N. E. 474; Reg. v. Llangian, 4 B. & S. 249; *Woodbury v. Berry*, 18 Ohio St. 456; *Wills v. Russell*, 100 U. S. 621, 25 L. Ed. 607; *Beatty v. Richardson*, 56 S. C. 173, 34 S. E. 73, 46 L. R. A. 576; *Johnson v. Barham*, 99 Va. 305, 38 S. E. 136.

In *Richards v. McBride*, L. R. 8 Q. B. 119, the question was the meaning of "the day next appointed." It was contended that it meant "the next appointed day." Grove, J.: "No one in construing a statute or any other literary production could put such a construction on the words unless by supposing there was a mistake. But we cannot assume a mistake in an act of parliament. If we did so we should render many acts uncertain by putting different constructions on them according to our individual conjectures. The draftsman of this act may have made a mistake. If so the remedy is for the legislature to amend it. But we must con-

strue acts of parliament as they are, without regard to consequences, except in those cases where the words are so ambiguous that they may be construed in two senses; and even then we must not regard what happened in parliament, but look to what is within the four corners of the act, and to the grievance intended to be remedied, or, in penal statutes, to the offenses intended to be corrected. Taking the words 'the day next appointed' to mean what they say, viz: the day which shall be next appointed, is there anything in the act itself to show that the legislature meant 'the next day appointed?' I find nothing. I even doubt whether, if there were no words in the act tending strongly the other way, I could pass from the plain grammatical construction of the phrase in question. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must, as Parke, B., said in *Becke v. Smith*, 2 M. & W. 195, advance something which clearly shows that the grammatical construction would be repugnant to the intention of the act or lead to some manifest absurdity."

⁷⁸ *Blanchard v. Sprague*, 3 Sumn. 279, Fed. Cas. No. 1517.

ambiguous and therefore inoperative.⁷⁹ It was remarked by the court that it "may not allow conjectural interpretation to usurp the place of judicial exposition. There must be a competent and efficient expression of the legislative will." "Whether a statute be a public or private one," says Chief Justice Ruffin, "if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."⁸⁰

§ 412. Same — Illustrations.— A New York liquor tax law of 1896 repealed numerous acts including "chapter 744 of the laws of 1895." This related to a sewer in Rochester. Chapter 774 of the laws of 1895 was a liquor law. The designation of chapter 744 was held to be a clerical mistake and the chapter was held not to be repealed.⁸¹ An act purported to amend section 2 of chapter 112. The amendment had no relevancy to section 2 but did to section 11 of that chapter. It was held to be a clerical mistake and the act was construed as amending section 11.⁸² Where the literal reading of an act striking out certain words from a statute would render the section senseless and it was evidently not the intent to nullify the law, and that a clerical error was made by expunging too many words, the error may be corrected by the court. Thus a statute provided that "any person not being threatened with, *or having good and sufficient reason to apprehend an attack*, who carries concealed" various enumerated weapons should be guilty of an offense. The statute was amended by striking out the words in

⁷⁹ State v. Partlow, 91 N. C. 550, 49 Am. Rep. 652.

⁸⁰ Drake v. Drake, 4 Dev. 110.

⁸¹ McKee Land & Imp. Co. v. Swikehard, 23 Misc. 21, 51 N. Y. S. 399; McKee Land & Imp. Co. v. Williams, 63 App. Div. 553, 51 N. Y. S. 399.

⁸² State v. Cross, 44 W. Va. 315, 29 S. E. 527. The following are similar cases: Gray v. County Com'rs, 83 Me. 429, 22 Atl. 376; Lowell v. Washington County R. Co., 90 Me. 80, 37 Atl. 869; People v. Lord, 9 App. Div. 458, 41 N. Y. S. 343.

italics. It was held that the striking out of the words "an attack" was a clerical error, and the statute as amended was read with these words in.⁸³ But when a section is amended and re-enacted and a clause or part omitted and the section makes sense with or without the omitted part, there is no presumption that the legislature did not intend the omission.⁸⁴

§ 413. Same — Illustrations continued.— Some interesting and instructive cases will now be noticed showing the tendency of courts to uphold acts of the legislature and give them a sensible meaning and operation, notwithstanding errors and omissions. A statute as printed omitted the word "not," which appeared in the enrolled act. Afterwards the statute was amended and re-enacted and the word "not" omitted from both the enrolled and printed acts. It was held to be a clerical error and the omitted word was construed into the amended act. The court says: "The omission of the word 'not' at the point indicated makes the whole act incongruous and unintelligible, while with that word incorporated it is easily understood, clear, and makes the whole act harmonious. It is apparent that the omission was an inadvertence. To adopt a literal construction of the act as it stands would lead to absurd results; and we cannot suppose the legislature to have intended such results."⁸⁵

The constitution of California provides that the legislature may classify counties by population for the purpose of fixing the compensation of county officers. In 1883 an act was passed to regulate the compensation of county officers. Section 162 divided the counties into forty-eight classes. The thirty-ninth embraced those having 5,600 and under

⁸³ Earhart v. State, 67 Miss. 325, 7 So. 347; and see Abernathy v. Mitchell, 113 Ga. 127, 38 S. E. 303; Ball v. Mapp, 114 Ga. 349, 40 S. E. 272; ante, § 236.

St. 80, 34 Atl. 954. But see Loper v. State, 82 Minn. 71, 84 N. W. 650, which is cited and stated in the next section.

⁸⁴ State v. Simon, 20 Ore. 365, 26 Pac. 170; Sener v. Ephrata, 176 Pa.

⁸⁵ Hutchings v. Commercial Bank, 91 Va. 68, 20 S. E. 950.

6,000; the fortieth, those having 5,300 and under 5,600; the forty-first, those having 5,000 and under 5,300. There was also a section for each class, fixing the compensation of the officers for that class. Section 201 related to class thirty-nine, section 202 to class forty, and section 203 to class forty-one. In 1889 section 162 was amended by inserting a class thirty-nine and one-half, having 5,000 and under 5,640, and changing class thirty-nine to those having 5,640 and under 6,000. The section was re-enacted leaving classes forty and forty-one unchanged. The new class included all of the fortieth and forty-first classes and at the same time these were re-established without change. At the same time a new section numbered 201½ was inserted, which fixed the compensation of officers in the new class. It was held that the inserting of a new number instead of dropping a number showed an intent to create a new class, and that 5,000 was used by mistake instead of 5,600 in stating the minimum of the class, and the statute was corrected accordingly.⁸⁶

An act of Minnesota provided "that the sum of two hundred dollars be paid to any person or persons for the arrest and conviction of *each and every person that steals a horse or borrows from any person or persons in this state,*" which amount, etc. An amendatory act recited its purpose to be to change the amount of the bounty, and the section was re-enacted with *fifty dollars* in place of *two hundred dollars* and the italics omitted. The titles of both the original and amendatory acts indicated that the acts related to bounties for the arrest of horse thieves. The omission of the words in italics was held to be a clerical mistake and the same were supplied by construction.⁸⁷

⁸⁶ Donlon v. Jewett, 88 Cal. 530, 26 Pac. 370.

⁸⁷ Loper v. State, 82 Minn. 71, 84 N. W. 650. The court says: "Without the history of the law or reference to its title, it would be impossible to supply this omission, but it

is unreasonable and absurd to conclude that the legislature intended in the amendment, adopted in the interest of economy, to provide a bounty for the conviction of every criminal offense in the catalogue of crime from murder to assault

An act in regard to local improvements provided the board of local improvements, upon receiving a petition for such an improvement, should give notice of a public hearing and provided as to the notice as follows: "Said notice shall contain the substance of the resolution adopted by the board and the estimate of the cost of the proposed improvement, and a notification that the extent, nature, kind, character and estimated cost of such proposed improvement may be changed by said board at the public consideration thereof, and *that* if upon such hearing the board shall deem such improvement desirable, it shall adopt a resolution therefor and prepare and submit an ordinance therefor as hereinafter provided." The court held that the word "*that*" in italics was inserted by mistake and should be stricken out and that what followed it need not appear in the notice.⁸⁸ Some additional cases of the same nature are referred to in the margin.⁸⁹

§ 414 (262). **Effect of context and association of words and phrases — Maxim noscitur a sociis.**—Not only are words and provisions modified to harmonize with the leading and controlling purpose or intention of an act, but also by comparison of one subordinate part with another; that is to say, the sense of particular words or phrases may be greatly influenced by the context, or their association with other words and clauses. The principle is embodied in the maxim, *noscitur a sociis*, and is applicable to the construction of all written instruments.⁹⁰ When two or more words are grouped together, and have ordinarily a similar mean-

and battery, which construction would be in conflict with its title, and in violation of Const., art. 4, § 27."

⁸⁸ Gage v. Chicago, 201 Ill. 93, 66 N. E. 374.

⁸⁹ Comfort v. Kittle, 81 Iowa, 179, 46 N. W. 988; State v. Justus, 85 Minn. 279, 88 N. W. 759, 89 Am. St. Rep. 550; People v. Lohnas, 54

Hun, 604, 8 N. Y. S. 104; State v. Stillman, 81 Wis. 124, 51 N. W. 260.

⁹⁰ Virginia v. Tennessee, 148 U. S. 503, 13 S. C. Rep. 728, 37 L. Ed. 537; Wood v. Michigan Air Line R. Co., 81 Mich. 358, 45 N. W. 980; Duluth v. Duluth St. Ry. Co., 60 Minn. 178, 62 N. W. 267; Cardenas v. Miller, 106 Cal. 250, 39 Pac. 783, 41 Pac. 472; Toedtemeier v. Clack-

ing, but are not equally comprehensive, they will qualify each other when associated; they may import a conventional sense and have great scope when so used without restriction in the context, and they may be capable of widely different applications when specialized by accompanying provisions expressive of a particular intention or limited application.⁹¹ The expression, for instance, of "places of public resort" assumes a very different meaning when coupled with "roads and streets" from that which it would have if the accompanying expression was "houses."⁹² In an enactment respecting houses "for public refreshment, resort and entertainment," the last word was understood to refer to, not a theatrical or musical or other similar performance, but something contributing to enjoyment of the "refreshment."⁹³ By an act for clearing, watching and regulating the streets of a township, the commissioners were authorized to ascertain the sum to be raised by rates or assessments on the several inhabitants, and to raise such sums by rate or assessment upon the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses and other buildings, gardens and grounds, and other tenements in the township. It was held that under this act the trunks and pipes, works and other apparatus of a water company, for the supply of the town with water, did not constitute a tenement within the meaning of the act, and therefore the company were not liable to be rated in respect of such property. The word *tenement* was used in other provisions of the act to denote buildings.

amus County, 34 Ore. 66, 54 Pac. 954; In re Brockelbank, L. R. 23 Q. B. D. 461.

⁹¹ Bear Brothers v. Marx, 63 Tex. 298; Moeller v. Harvey, 16 Phila. 66.

⁹² Endlich on St., § 400, citing for examples, In re Jones, 7 Ex. 586; 21 L. J. M. C. 116; In re Brown, id. 113; Reg. v. Brown, 17 Q. B. 833; Ex parte Freestone, 25 L. J. M. C. 121;

Davys v. Douglas, 4 H. & N. 180; 28 L. J. M. C. 193; Sewell v. Taylor, 29 id. 50; 7 C. B. (N. S.) 160; Case v. Storey, L. R. 4 Ex. 319; Skinner v. Usher, L. R. 7 Q. B. 422; Reg. v. Charlesworth, 2 Lowndes, M. & P. 117; Wilson v. Halifax, L. R. 3 Ex. 114.

⁹³ Endlich on St., § 400; Muir v. Keay, L. R. 10 Q. B. 594.

"These are some of the instances," says Bayley, J., "in which the word *tenement* is used in this act; and from these instances and the object of the act, it may be collected in what sense it uses that word. The omission to use the obvious and general word 'land,' and yet introducing 'gardens and garden grounds,' implies that 'lands' in general are not intended to be rated. The object of the act was to give security and accommodation to the residents and to their property. The inhabited houses, therefore, and everything connected with residence or trade, as they have the advantage, were to be liable to the charge. The houses, warehouses, shops and all other buildings were to be rated, because they all had protection. But why were gardens and garden-grounds to be included if lands in general were not? Possibly, because the produce thereof was of value, and was a possible object of depredation, and the general lighting and watching of the town would give so much additional protection to this species of property as might properly make it the subject of charge. Gardens, therefore, and garden-grounds may, on this account, be distinguished from other descriptions of land, and may be subjected to this charge, whilst land in general is exempt. Pasture ground, for instance, stone quarries, and other kinds of real property, though included in the 43d Elizabeth as affording income, and supplying, therefore, the means of contribution, are omitted in this act, because such property derives no equivalent or material protection from it."⁹⁴ A statute provided "that every person who shall be brought before any of the said magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanor." This was held, on account of the associated words and context, to apply only to possession in the streets, and not to possession in a house. "Taken by

⁹⁴ Reg. v. Manchester, etc. Waterworks Co., 1 B. & C. 630.

themselves alone," said Blackburn, J., "the words 'having in his possession,' of course include the case of a person having in his possession at any time, in any manner or in any place. But here we have them in connection with the words, 'or conveying in any manner anything which may be reasonably suspected of being stolen or obtained.' . . . I think the words of the statute sufficiently show that the legislature intended to confer this summary power only in the case where the person was 'having and conveying' in the sense of 'having' *ejusdem generis* with 'conveying,' being in the streets or roads with them, or carrying them about."⁹⁵

§ 415 (263). Illustrations.—The controlling effect in construction of associated words is well illustrated in Schenley's Appeal.⁹⁶ The question was the existence of a mechanic's lien on a dwelling-house under a statute providing for a lien on "*improvements*, engines, pumps, machinery, screens and fixtures erected, repaired or put in by mechanics, persons or material-men entering liens thereon." Agnew, J., said: "Though the word '*improvements*' is large enough under ordinary circumstances to include a house or private dwelling, it is manifest, by its connection in this act with the words engines, pumps, etc., and by the two counties to which it was originally made applicable, that the word was not intended to authorize the creation of liens upon ordinary houses and dwellings of tenants independently of the works indicated by the other expressions used in connection with the word improvements."⁹⁷ In a revenue act it was pro-

⁹⁵ Hadley v. Perks, L. R. 1 Q. B. 444.

⁹⁶ 70 Pa. St. 98.

⁹⁷ Where it appeared that an insurance company constituted a person named its agent, and there was no definition of his powers, the word "agent," it was held, should be taken in its general signification, and as embracing all

powers which the company might confer on one whom it selected to represent it. He was authorized to act as "agent or surveyor," and the court remarked: "If it be said that the word 'surveyor' limits and defines 'agent,' we answer, not any more than 'agent' limits and defines 'surveyor;' in other words, either includes the duties and pow-

vided in one section that "every railroad company, steamboat company, canal company and slackwater navigation company, and all other navigation companies doing business in this state, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike, plankroad and bridge companies, . . . shall pay a tax as upon tonnage." The next section provided that, in addition to the taxes provided for as aforesaid, every railroad, canal and transportation company liable to a tax on tonnage under the preceding section shall pay a certain tax on gross receipts. The preceding section had not used the phrase "transportation company," but had simply designated some companies by name, and designated others as companies upon whose works freight might be transported as the means of bringing all under a liability for the tonnage carried over their work, whether carriers themselves or not. When the phrase "transportation companies" was used in the subsequent section it was a *nomen collectivum* to embrace all the companies which had been described in the other section, and was intended to include all steamboat, slackwater navigation and other companies "upon whose works freight may be transported."⁹⁸

§ 416 (264). Same.—Where a statute was indefinite and obscure, the court, in view of all the indications afforded by the context, construed this proviso as applicable only to the tenant: "That no appeal shall lie in the case of rent, but the remedy by replevin shall remain as heretofore."⁹⁹ The literal terms of a statute prohibited any lien as against purchasers and mortgagees by four species of judicial acts and proceed-

ers of both; the agent is surveyor v. Sheffield & B. Coal, etc. Co., 42
and the surveyor is agent; one offi- Fed. 106.

cer is clothed with the powers nec-⁹⁸ Commonwealth v. Mononga-
essary to fill both offices." Lyco- hela Nav. Co., 66 Pa. St. 81.

ming F. Ins. Co. v. Woodworth, 83⁹⁹ Hilke v. Eisenbeis, 104 Pa. St.
Pa. St. 223. See Central Trust Co. 514.

ings, viz.: (1) Judgments; (2) recognizances; (3) executions levied on real estate, and (4) writs of *scire facias* to revive or have execution of judgments, unless the same were indexed as prescribed. All of these acts and proceedings were within the function of, and indeed peculiar to, the court of common pleas, and all, save one, were exclusively cognizable and possible in that court. The recognizance was known in the orphans' court, as it was in the criminal court, but the others were not. But the recognizance is also a form of obligation known to the practice of the common pleas, and, therefore, where it is coupled with other acts and proceedings of that court, the whole being subject to a regulation common to all, it is not necessary to infer that it is used in any other than its natural, associated sense. Therefore, it was held that recognizances taken in the orphans' court to operate as liens were not required to be indexed.¹ The word "records" may be restrained by the context to mean only those in the office of registers of deeds.² In a marine policy the underwriters insured against the wrongful acts of individuals under the description of "pirates, rogues, thieves," and it also insured against loss by arrests, etc., by all "kings, princes and *people*." The word "people" was construed to mean the power of the country.³

§ 417 (265). Same.—A statute of limitations as to a claim to any way or other easement, or to any water-course, or the use of any water, to be enjoyed or derived upon, over or from any "land or water," does not include the servitude of allowing "the streams and currents of air and wind to pass over land to a mill."⁴ It points to a right belonging to an individual in respect of his land, not a class such as freemen or citizens claiming a right in gross wholly irrespective of land.⁵ It was enacted that "any tenement or

¹ Holman's Appeal, 106 Pa. St. 502. 268; S. C., 13 id. 841; Bryant v.

² Carter v. Peak, 138 Mass. 439. Lefever, 4 C. P. Div. 172.

³ Nesbitt v. Lushington, 4 T. R. 783. ⁵ Mounsey v. Ismay, 3 H. & C. at p. 497.

⁴ Webb v. Bird, 10 C. B. (N. S.)

part of a tenement occupied as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house, shall be exempt" from certain duties. It was held on the maxim *noscitur a sociis*, that the business of a telegraph company is a trade within the meaning of that statute.⁶ The word "delivery," being associated in a bankrupt act with "gift or transfer," was held to be confined to transactions of the same nature; that to be a delivery it must purport to part with some property or interest in the goods delivered, to amount to an act of bankruptcy.⁷ A carriers' act, providing for mitigation of the responsibility of carriers, contained an enumeration of articles within its provisions, among which were "paintings, engravings, pictures;" and a question arose whether colored imitations of rugs and carpets and working designs, each of them valuable and designed by skilled persons and hand-painted, but having no value as works of art, were included within that provision. It was decided that they were not. The word "paintings," being associated with "engravings and pictures," was to be understood as meaning paintings valuable as works of art. This conclusion was deemed to be in accord with the general or popular meaning of the word.⁸

§ 418 (266). *Same.*—When two words or expressions are coupled together, one of which generically includes the other, it is obvious that the more general term is used in a meaning excluding the specific one.⁹ A revenue act of congress exempted from duty "animals of all kinds; birds, singing,

⁶ Chartered Mercantile Bank, etc. v. Wilson, L. R. 3 Ex. D. 108.

⁷ Cotton v. James, Mood. & Mal. 278; Isitt v. Beeston, L. R. 4 Ex. 159.

⁸ Woodward v. London, etc. Ry. Co., 3 Ex. D. 121.

⁹ Endl., § 396; Rex v. Cowell, 2 East, P. C. 617; Rex v. Loom, 1 Moo. C. C. 160; Dewhurst v. Feilden,

7 M. & G. 182; Peto v. West Ham, 2 E. & E. 144; Reg. v. Midland R. Co., 4 E. & B. 958; Lead Smelting Co. v. Richardson, 3 Burr. 1341; Rex v. Sedgley, 2 B. & Ad. 65; Rex v. Cunningham, 5 East, 478; Morgan v. Crawshay, L. R. 5 H. L. 304; Bourguignon Building Ass'n v. Commonwealth, 98 Pa. St. 54, 65; Dick's Appeal, 106 Pa. St. 589.

and other, and land and water fowls." A later act levied a duty of twenty per cent. "on all horses, mules, cattle, sheep, hogs and other live animals." It was held that birds were not included in the term "other live animals" as used in the later act.¹⁰ "This act of 1861," said Mr. Justice Davis, "was in force when the act of 1866—the act in controversy—was passed, and it will be seen that birds and fowls are not embraced in the term 'animals,' and that they are free from duty, not because they belong to the class of 'living animals of all kinds,' but for the reason that they are especially designated. It is quite manifest that congress, adopting the popular signification of the word 'animals,' applied it to quadrupeds, and placed birds and fowls in a different classification. Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia*; and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the later act, in the absence of anything to show a contrary intention."¹¹

§ 419. Same.—A statute gave a right of action to railroad employees injured by reason of the negligence of a co-employee while engaged in operating, running, riding upon or switching passenger, freight or other trains, engines or cars. It was held that the word "cars" included hand cars. The claim was made that being associated with trains and engines it meant only cars usually operated in trains and by means of locomotives. The court says: "A court has no right to resort to the maxims of *noscitur a sociis* or *ejusdem generis* for the purpose of reading into a statute a distinction which the legislature neither made nor intended to make. These rules are not the masters of the courts, but merely their servants to aid in ascertaining the

¹⁰ *Reiche v. Smythe*, 13 Wall. 162, 50 U. Ed. 566.

¹¹ *Id.*

legislative intent. They afford a mere suggestion to the judicial mind that where it clearly appears that the law-makers were thinking of a particular class of persons or objects their words of more general description may not have been intended to embrace any other than those within the class. . . . Hand cars are used in the ordinary business of railroads. As already suggested, their use is within the mischief of the statute. There is nothing in the statute requiring that the car be connected with a locomotive or with other cars forming a train, or that it must be made to be propelled by any particular kind of power in order to bring a case within its operation. We do not think that the fact that the word 'cars' is enumerated with 'trains' and 'engines' restricts its meaning to cars propelled by engines, or to cars usually operated as part of a train."¹²

§ 420 (267). **Relative and qualifying words and phrases.**¹³ Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent.¹⁴ A proviso is construed to apply to the provision or clause immediately preceding.¹⁵ Where the by-laws of a society provided first for an annual meeting for the election of officers, and then for a monthly

¹² *Benson v. Chicago, etc. Ry. Co.*, 75 Minn. 163, 77 N. W. 798, 74 Am. St. Rep. 444. In *People v. Bridges*, 142 Ill. 30, 31 N. E. 115, it is said that the rule *noscitur a sociis* is usually applied to restrict the meaning of words, and the court adds: "The rule, however, does not seem to have the converse operation. Thus, when various specific terms are associated with words of a more general character, and the ordinary signification of the general words is more restricted than that of all the specific terms taken collectively, the meaning of the general words may be enlarged, but the scope of the specific words used

will not be restricted or their force practically nullified by their association with general words of that character."

¹³ See *ante*, §§ 345, 351.

¹⁴ *Fowler v. Tuttle*, 24 N. H. 9; *State v. Brown*, 3 Heisk. 1; *Ellis v. Murray*, 28 Miss. 129; *Cushing v. Worrick*, 9 Gray, 383; *Gyger's Estate*, 65 Pa. St. 311; *Fisher v. Connard*, 100 id. 63; *Staniland v. Hopkins*, 9 M. & W. 178.

¹⁵ *Partington, Ex parte*, 6 Q. B. at p. 653; *Spring v. Collector*, 78 Ill. 101; *Lehigh Co. v. Meyer*, 102 Pa. St. 479. See *United States v. Babbitt*, 1 Black, 55, 17 L. Ed. 94; *Re Cambrian Railway Scheme*, L. R. 3 Ch. 278; § 352.

meeting on a specified day "at half-past seven o'clock, P. M.," it was held that the clause specifying the hour of meeting had reference only to the monthly meeting.¹⁶ The intention is sufficiently obvious in the following provision for the establishment of libraries, without recourse to any rule. It is nevertheless within this principle. It was provided that any town or city might appropriate money for suitable buildings or rooms, and for the foundation of a library, a sum not exceeding one dollar for each of the ratable polls in the year next preceding, and, annually thereafter, a sum not exceeding fifty cents for each of its ratable polls. It was held that the power to make the subsequent appropriations, with its limitation, was for the same object as the first, and did not apply to the power to appropriate for buildings or rooms.¹⁷ An act provided for the adoption of a statute by cities and towns "at a legal meeting of the city council, or the inhabitants of the town called for that purpose." It was held that "called for that purpose" did not apply to a city council.¹⁸ This principle is of no great force; it is only operative when there is nothing in the statute indicating that the relative word or qualifying provision is intended to have a different effect. And very slight indication of legislative purpose or a parity of reason, or the natural and common-sense reading of the statute, may overturn it and give it a more comprehensive application.¹⁹ Thus, as was said by the court in *Great Western Railway Company v. Swindon*,²⁰ referring to the phrase "horses, oxen, pigs and sheep, *from whatever country they come*," the last clause would apply alike to all these animals and not alone to sheep. In furtherance of the intention it was held in that case that in the construction of the phrase "messuages, lands, tenements and hereditaments *of any tenure*,"

¹⁶ *State v. Conklin*, 34 Wis. 21.

¹⁹ *Gyger's Estate*, 65 Pa. St. 311;

¹⁷ *Dearborn v. Brookline*, 97 Mass. 466. *Fisher v. Connard*, 100 Pa. St. 63.

²⁰ *L. R. 9 App. Cas.* at p. 808.

¹⁸ *Quinn v. Lowell Electric L. Co.*, 140 Mass. 106, 3 N. E. 200.

the last and qualifying words, "of any tenure," applied to all the preceding words and not merely to "hereditaments."²¹ Qualifying words have been applied to several preceding sections where the nature of the provisions and the obvious sense required it. Thus, where there was a restriction relating to the compensation of certain officers, upon the ground of reason and intention as to all, and the improbability of a contrary design, it was held not limited in its effect to the section where it was inserted, but was an independent proposition applying alike to all officers of the same class.²² Where the intention is manifest, a proviso, or qualifying words or clauses found in the middle of a sentence, may be placed at the end;²³ or, when inserted in one section, they may be applied to the matter of another section.²⁴

§ 421. *Same.*—A section of a statute read as follows: "The maximum annual compensation allowed to any deputy or assistant is as follows: undersheriff not to exceed \$1,800," and in like manner to the last, which was "chief deputy county attorney, \$1,800." The claim was that the omission of the words "not to exceed" in connection with the last officer had the effect of fixing his compensation absolutely at \$1,800. But the court held that the fore part of the section qualified all that followed and had the same effect.²⁵ An act required "that it shall be the duty of the supervisors of the several townships, and the street commissioners, or other persons having charge of the highways in incorporated boroughs, to keep in repair all bridges

²¹ See *Eby's Appeal*, 70 Pa. St. 311, 314; *Coxson v. Doland*, 2 Daly, 66; *Hart v. Kennedy*, 15 Abb. Pr. 290.

²² *United States v. Babbit*, 1 Black, 55, 17 L. Ed. 94.

²³ *Waters v. Campbell*, 4 Sawyer, 121, Fed. Cas. No. 17,264.

²⁴ *State v. Turnpike Co.*, 16 Ohio St. 308; *Brown County v. Aber-*

deen, 4 Dak. 402, 31 N. W. 735; *State v. Wall*, 153 Mo. 216, 54 S. W. 465; *State v. St. Louis*, 174 Mo. 125, 73 S. W. 623; *People v. Rosenberg*, 138 N. Y. 410, 34 N. E. 285. See *Matthews v. Commonwealth*, 18 Gratt. 989; *State v. Forney*, 21 Neb. 223, 226.

²⁵ *Penwell v. County Commissioners*, 23 Mont. 351, 59 Pac. 167.

built, or that may hereafter be built, by the county commissioners *at the charge of the county.*" It was held that the italics modified *built*, not *repair*.²⁶ In case of a claim for damages for stock killed or injured by a railroad company the claimant was required to give notice "to any general agent or officer of such corporation or person or to any station, depot or other agent or officer *acting for said corporation in the county where the live stock was killed or injured.*" The italics were held to qualify only the words after the word "person."²⁷ Further examples on the construction of relative and qualifying words and phrases are given in the margin.²⁸

§ 422 (268). When general words follow particular — **Doctrine of ejusdem generis.**— When there are general words following particular and specific words, the former must be confined to things of the same kind.²⁹ This is known as the rule or doctrine of *ejusdem generis*. Some judicial statements of this doctrine are here given. "When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated."³⁰ "The rule is, that where words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things or cases of like kind to

²⁶ Whitmire v. Muncy Creek, 17 Pa. Supr. Ct. 399.

²⁷ Jacksonville, T. & K. W. Ry. Co. v. Harris, 33 Fla. 217, 14 So. 726, 39 Am. St. Rep. 127.

²⁸ Brenner v. Kansas Mut. Life Ass'n, 6 Kan. App. 152, 51 Pac. 303; Louisville & N. R. R. Co. v. Catron, 103 Ky. 323, 43 S. W. 443; State v. Fernandez, 39 La. Ann. 538, 2 So. 233; Greer v. Major, 114 Mo. 145, 21 S. W. 481; Rhea v. State, 63 Neb. 461, 88 N. W. 789; Deven v.

York City, 156 Pa. St. 359, 27 Atl. 247; Fellows v. Scranton, 1 Pa. Dist. Ct. 554.

²⁹ Reg. v. Edmundson, 28 L. J. M. C. 215; 2 E. & E. 77; Gunnestad v. Price, L. R. 10 Ex. 69 (but see The Alina, 5 Ex. Div. 227; S. C., 5 Prob. Div. 138; The Rowa, 7 id. 247); Washer v. Elliott, L. R. 1 C. P. Div. 174; Foster v. Blount, 18 Ala. 687.

³⁰ Gundling v. Chicago, 176 Ill. 340, 346, 52 N. E. 44, 48 L. R. A. 280.

those designated by the particular words.”³¹ “It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes but to those affecting only civil rights and duties, that where words particularly designating specific acts or things are followed by and associated with words of general import, comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used, not in the broad sense which they might bear if standing alone, but as related to the words of more definite and particular meaning with which they are associated.”³² The general rule is supported by numerous cases.³³

³¹ *Nichols v. State*, 127 Ind. 406, 26 N. E. 839.

³² *State v. Walsh*, 43 Minn. 444, 445, 45 N. W. 721.

³³ *Hurd v. McClellan*, 14 Colo. 213, 23 Pac. 792; *Washington Elec. Vehicle Trans. Co. v. District of Columbia*, 19 App. Cas. (D. C.) 462; *Balkcom v. Empire Lumber Co.*, 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58; *Grier v. State*, 103 Ga. 423, 30 S. E. 255; *Davis v. Dougherty County*, 116 Ga. 491, 42 S. E. 764; *Misch v. Russell*, 136 Ill. 22, 26 N. E. 528, 12 L. R. A. 25; *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; *Webber v. Chicago*, 148 Ill. 313, 36 N. E. 70; *Cecil v. Green*, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566; *Elgin Hydraulic Co. v. Elgin*, 194 Ill. 476, 62 N. E. 929; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451; *Marquis v. Chicago*, 27 Ill. App. 251; *Cairo v. Coleman*, 53 Ill. App. 680; *McKean v. Wolf*, 75 Ill. App. 325; *Philips v. Christian County*, 87 Ill. App. 481; *Stiles v.*

Wiggins Ferry Co., 97 Ill. App. 157; *Roberts v. Detroit*, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572; *Rhone v. Loomis*, 74 Minn. 200, 77 N. W. 31; *State v. Barge*, 82 Minn. 256, 84 N. W. 911, 1116, 53 L. R. A. 428; *Leinkauf v. Banes*, 66 Miss. 207, 5 So. 402; *Greenville Ice & C. Co. v. Greenville*, 69 Miss. 86, 10 So. 574; *State v. Canon*, 106 Mo. 488, 17 S. W. 660; *State v. Dinnisse*, 109 Mo. 434, 19 S. W. 92; *State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; *State v. South*, 136 Mo. 673, 38 S. W. 716; *Ruckert v. Grand Ave. Ry. Co.*, 163 Mo. 260, 63 S. W. 814; *Bachman v. Brown*, 57 Mo. App. 68; *McCutcheon v. Pacific R. R. Co.*, 72 Mo. App. 271; *State v. Ennis*, 79 Mo. App. 12; *Kine v. Crider*, 6 Pa. Dist. Ct. 688; *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195; *American Manganese Co. v. Va. Manganese Co.*, 91 Va. 272, 21 S. E. 466; *People v. Dolan*, 5 Wyo. 245, 39 Pac. 752; *Baker v. Cook County Com'rs*, 9 Wyo. 51, 59 Pac. 797; *United States*

The object of enumeration is to set forth in detail things which are in themselves so distinct that they cannot conveniently be comprehended under one or more general terms; there is believed to be no *a priori* presumption that the things enumerated are all of them of the same kind. When a specific enumeration concludes with a general term it is held to be limited to things of the same kind.³⁴ It is restricted to the same genus as the things enumerated.³⁵

§ 423 (269). *Illustrations.*—It was held that a bull was not included under the words “or other cattle” as used in a statute which made it indictable for any person to wantonly or cruelly beat, abuse and ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep or other cattle.³⁶ Bayley, J., said: “Horse, mare, gelding, are one class; ox, cow, heifer and steer are another, and in my opinion the bull is not included in this act.” Where an act imposed a penalty on any person hauling “any timber or stone or other thing, otherwise than upon wheeled carriages,” it was held not to extend to straw, but was confined to things as weighty and as likely to cause injury to roads as timber or stone.³⁷ It was provided by the winding-up acts that the court might wind up a company if a special resolution was passed, or the business of the company was not commenced within a year, or the number of members was reduced below seven, or the company was unable to pay its debts, or if the court thought it just and equitable that the company should be wound up. It was held that the grounds upon which the court might form its conclusion must be *ejusdem generis* with those already enumerated.³⁸

v. Wilson, 58 Fed. 768; *Bruen v. State*, 206 Ill. 417, 69 N. E. 24; *Lassen v. Karrer*, 117 Mich. 512, 76 N. W. 73; *State v. Krueger*, 134 Mo. 262, 35 S. W. 604; *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533.

³⁴ *Countess of Rothes v. Kirkcaldy Water Works Commissioners*, L. R. 7 App. Cas. 706.

³⁵ *Fenwick v. Schmalz*, L. R. 3 C. P. 315.

³⁶ *Hill, Ex parte*, 3 C. & P. 225.

³⁷ *Radnorshire Co. Road Board v. Evans*, 3 B. & S. 400.

³⁸ *Wilb. on St.* 181; *Spackman, Ex parte*, 1 Macn. & G. 170; *Re Anglo-Greek Steam Co.*, L. R. 2 Eq. 1.

Landlords were authorized by statute to distrain for rent "all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever, which shall be growing on any part of the estates demised." This did not include trees, shrubs and plants growing in a nursery garden.³⁹ The memorandum of a company stated that the company was formed for the purpose, among others, "of carrying on the business of mechanical engineers and general contractors." A question was: What was the scope of the concluding words, "general contractors." Lord Cairns said: "Upon all ordinary principles of construction, these words must be referred to the part of the sentence which immediately precedes them; . . . therefore, . . . the term "general contractors" would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers. . . . If these words were not to be interpreted as I have suggested, the consequence would be that they would stand absolutely without any limit of any kind."⁴⁰ An act made a railroad company liable for killing certain enumerated domestic animals, "et cetera." It also excluded from being witnesses employees of the company who might be responsible to it for negligence "by which any *stock* may be injured or killed as contemplated by this act." It was held that the act did not apply to negro slaves.⁴¹

§ 424 (270). Same.— It was enacted that "no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any labor, business, or work, of their ordinary callings upon the Lord's day." This has been held not to include a farmer,⁴² or drivers of stage-coaches,⁴³ or attorneys.⁴⁴ On the same principle "parochial relief or

³⁹ Clark v. Gaskarth, 8 Taunt. 431.

⁴² Reg. v. Cleworth, 4 B. & S. 927.

⁴⁰ Ashbury Co. v. Riche, L. R. 7

⁴³ Sandiman v. Breach, 7 B. & C.

H. L. 653. See Great Western Ry.

96.

Co. v. Swindon, etc. Ry. Co., L. R. 9

⁴⁴ Peate v. Dicken, 1 C. M. & R.

App. Cas. 787.

422.

⁴¹ Scaggs v. Baltimore, etc. R. R.

Co., 10 Md. 268.

other alms" means other parochial alms.⁴⁵ "Cities, towns, corporate boroughs and places" do not include places which are not incorporated.⁴⁶ An act empowering justices to determine differences between masters and persons in several employments, and "servants in husbandry, artificers, handicrafters," and finally "all other laborers," does not by these words extend to a domestic servant;⁴⁷ nor to a man employed to take care of goods seized under a writ.⁴⁸ "County, riding or division" means a division analogous to a county or riding.⁴⁹

§ 425 (271). Same.—A Michigan statute gave "every wife, child, parent, guardian, husband or other person" a right of action against a liquor-seller for injury done to the plaintiff by reason of the intoxication of any person. On the ground and principle under consideration, it was held that the intoxicated person himself was not within the statute.⁵⁰ Another statute of the same state provides that "every person who shall set fire to any building mentioned

⁴⁵ Reg. v. Lichfield, 2 Q. B. 693.

⁴⁶ Rex v. Wallis, 5 T. R. 375.

⁴⁷ Kitchen v. Shaw, 6 Ad. & E. 729.

⁴⁸ Bramwell v. Penneck, 7 B. & C. 536.

⁴⁹ Evans v. Stevens, 4 T. R. 459.

⁵⁰ Brooks v. Cook, 44 Mich. 617, 7 N. W. 216. In Higler v. People, 44 Mich. 299, 16 N. W. 664, 38 Am. Rep. 267, the statute provided for the punishment of any person who, "with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense," obtain signatures to a written instrument. It was held that the statute does not enumerate the false pretense in particular terms, so that the term "any other false pretense" is not limited to a particular kind of pretense, and the rule of construction that general

terms must be construed as of the same tenor as preceding particular terms previously enumerated has no application. In construing a common carrier's contract, containing provisions to qualify the carrier's responsibility, which exempted the railroad company from liability for losses and damages "in loading, unloading, conveyance and otherwise," whether arising from negligence, misconduct or otherwise, the court held that general words of exemption, when used after a designation of specific exemptions and risks, will be presumed to include only those of a similar character, unless a different intention is manifest. Hawkins v. Great W. R. R. Co., 17 Mich. 57; American Transportation Co. v. Moore, 5 Mich. 368.

in the preceding section, or to any other material, with intent to cause such building to be burnt, or shall by any other means attempt to cause any building to be burnt, shall be punished," etc. This provision was held to contemplate the employment of some physical means to constitute a punishable attempt to cause such building to be burnt, and an attempt by mere solicitation is not within the statute; for in construing statutes general terms are subordinated by preceding connected particulars; the rule is especially applicable in the interpretation of statutes defining crimes and regulating their punishment.⁵¹

§ 426 (272). *Same*.—A statute exempted from taxation "every building erected for the use of a college, incorporated academy or *other seminary of learning*." As all those enumerated were corporations, it was held that the general words "or other seminary" required that such institution should also be incorporated in order to have the benefit of the exemption.⁵² A railroad company was authorized by its charter "to purchase, hold and use all such real estate and other property as may be necessary for the construction of its railway and stations, and other accommodations as may be necessary to accomplish the objects of its incorporation." The term "other accommodations" was held not to include an elevator, costing two or three hundred thousand dollars, for storing and handling grain.⁵³ The court say: "It has no direct connection with the road or its operation; yet when shipments of grain are made either to or from it over the company's road, it is very clear the company can handle the grain thus shipped with more ease and greater facility, and hence can by means of it do a greater

⁵¹ *McDade v. People*, 29 Mich. 50; 4 Conn. 60, 10 Am. Dec. 100; *Chegaray v. Mayor, etc.*, 13 N. Y. 220; 1 *Cit. v. Moore*, 5 Mich. 368; *Hawkins v. Great W. R. R. Co.*, 17 Mich. 57, 97 Am. Dec. 179; *Matter of Ticknor's Est.*, 13 Mich. 44; *Phillips v. Poland*, L. R. 1 C. P. 204; *Hall v. State*, 20 Ohio, 7; *Daggett v. State*, 13 N. Y. 220; 1 Bish. Cr. L., § 149; *Dwarris*, 621.

⁵² *Chegaray v. Mayor, etc.*, 13 N. Y. 220.

⁵³ *Matter of Swigert*, 119 Ill. 83, 6 N. E. 460, 59 Am. Rep. 789.

business." In another part of the opinion the court say that "what is included in the expression 'other accommodations' must be of the same class or kind as 'railway and stations;'" that is a well settled doctrine that in construing statutes, particularly those requiring a strict construction, a general description following a specific enumeration of objects or things will be held to include only such as are of the same kind as those specifically enumerated. "Any works, mines, manufactory or other business where clerks, miners or mechanics are employed" does not include a hotel, for the general words "or other business" refer to some business *ejusdem generis*, as "works, mines, manufactory."⁵⁴

§ 427 (273). *Same.*—The words "other persons," following in a statute the words "warehousemen" and "wharfinger," must be understood to refer to other persons *ejusdem generis*, viz., those who are engaged in a like business, or who conduct the business of warehousemen or wharfingers with some other pursuit, such as shipping, grinding or manufacturing.⁵⁵ An act enabling the owner of realty to sustain an action of replevin to recover timber, lumber, coal or other property severed from the realty, notwithstanding the fact that the title to the land may be in dispute, does not apply to growing crops. The words "other property" in that act were held to be intended to include only articles of the same generic character as those enumerated — such as slate, marble, iron ore, zinc ore, and all other forms of minerals and ores, building stone, and fixtures and machinery of every description, which have been permanently affixed to the realty.⁵⁶ Provision by statute was made for compensation to owners abutting on streets for damage caused by a "change of the grade or lines" thereof, or in case the authorities "in any way alter or enlarge the same." The court, in a case for damages for widening an alley, say of the act: "It speaks of a change of the 'grade or lines'

⁵⁴ Sullivan's Appeal, 77 Pa. St. 107; Allen's Appeal, 81* Pa. St. 302. ⁵⁵ Bucher v. Commonwealth, 103 Pa. St. 528.

⁵⁶ Renick v. Boyd, 99 Pa. St. 555.

of any street; and, while the succeeding words, 'or in any way alter or enlarge the same,' might seem to apply to widening a street, yet, looking at the manifest object of the act [which was to compensate the owner whose property is not taken, but is injured by change of grade], we must read these general words in connection with such object. Tested by this familiar rule, it is manifest the general words referred to are qualified by the preceding special words, and that the act has no application where there is no change of grade.⁵⁷ A statute provided that "any married woman whose husband, either from drunkenness, profligacy or any other cause, shall neglect or refuse to provide for her support, . . . shall have the right in her own name to transact business." It was held that the words "any other cause" must be understood to be cause *ejusdem generis*, and that they do not include mere mental or physical incapacity.⁵⁸ So the power given to a board of supervisors to remove an inspector of the house of correction for certain specified causes, "or other cause satisfactory to the board," was held to include, by the effect of the last or general clause, only other *like* causes—that is, causes affecting the officer's fitness for the office.⁵⁹

§ 428 (274). Same.—A power to correct "manifest clerical or other errors in any assessments or returns" was intended simply to permit a correction of manifest and clerical errors; those apparent on the face of the assessments or returns; those of form and not of substance.⁶⁰ The statutes of New York relating to offenses of the nature of burglary enact that the term "building" includes "a railway car, vessel, booth, tent, shop, or other erection or inclosure;" and the general words were construed as limited to the same class of erections or inclosures already specified, and did not include a vault intended and used exclusively for the

⁵⁷ Re Brady Street, 99 Pa. St. 591.

⁵⁸ State v. McGarry, 21 Wis. 496.

⁵⁹ Edson v. Hayden, 20 Wis. 682;

⁶⁰ Matter of Hermance, 71 N. Y.

King v. Thompson, 87 Pa. St. 365, 431.

30 Am. Rep. 364.

interment of the dead.⁶¹ An action was brought to recover certain real property under a legislative act which authorized the people to bring an action to recover "money, funds, credits and property" held by public corporations, and wrongfully converted or disposed of; and it was held that the word "property," although in its widest meaning inclusive of all things that might be owned, yet, when taken in connection with other words used in the statute, and in view of the surrounding circumstances under which the act was passed, was not to be given its usual and enlarged meaning, but was limited to include only property of the same general character as that already mentioned in the statute, which was personal property.⁶²

§ 429 (275). *Same.*—A late English case involved the construction of an insurance policy. A steamer was insured by a policy on the ship and her machinery, including the donkey-engine. The policy covered perils of the sea, specially naming many, and then continued: "and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance or any part thereof." For the purposes of navigation the donkey-engine was being used in pumping water into the main boilers, when, owing to a valve being closed which ought to have been kept open, water was forced into and split open the air chamber of the donkey-pump. The closing of the valve was either accidental or due to the negligence of an engineer, and was not due to ordinary wear and tear. It was held that the injury was not covered by the policy, as it was not a peril of the sea; and although it was undoubtedly "a loss or misfortune," yet the specific words of the policy which preceded its general language, it was said, restricted it to the same genus as the specific words.⁶³ In the course of his judgment the

⁶¹ *People v. Richards*, 108 N. Y. 137, 11 Cent. Rep. 75, 15 N. E. 371. ⁶³ *Thames, etc. Ins. Co. v. Hamilton*, L. R. 12 App. Cas. 484.

⁶² *People v. N. Y. etc. R. R. Co.*, 84 N. Y. 565.

chancellor, Halsbury, said: "If understood in their widest sense the words are wide enough to include it [the injury]; but two rules of construction, now fairly established as a part of our law, may be considered as limiting these words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them." Power was delegated to a city by its charter to license "auctioneers, grocers, merchants, retailers, hotels, . . . hackney carriages, omnibuses, carts, drays and other vehicles, and all other business, trades, avocations and professions whatever." The profession of law was not specially enumerated in the section, and it was held not included in the grant of the power to tax, because it was not *ejusdem generis*.⁶⁴ An employer was made subject to a penalty if he should deduct directly or indirectly from the wages of any artificer in his employ any part of such wages *for frame rent and standing or other charges*. Where the employer was a hosier manufacturer, and an employee a hand-frame worker, and according to the regulations of the factory the latter was liable to a fine of 8*d.* a day for staying away from work without permission, and had been fined for that cause, and the amount deducted from his wages, it was held not within the statute; "other charges," following immediately after frame rent and standing, were taken to mean other charges *ejusdem generis*.⁶⁵ It was enacted that the business of a blood-boiler, bone-boiler, fell-monger, slaughterer of cattle, horses, or animals of any description, soap-boiler, tallow-melter, tripe-boiler, *or other noxious or offensive business, trade, or manufacture*, shall not be newly established in any building or place, etc.; and on the question whether a brick-maker was within the regulation, Erle, C. J., thus stated and answered it: "Is brick-making of necessity a business of a noxious or offensive

⁶⁴ *St. Louis v. Laughlin*, 49 Mo. R. I. 425; *White v. Ivey*, 34 Ga. 186; 559; *Grumley v. Webb*, 44 Mo. 444, *State v. Stoller*, 38 Iowa, 321. 100 Am. Dec. 304; *Stone v. Stone*, 1 ⁶⁵ *Willis v. Thorp*, L. R. 10 Q. B. 383.

nature analogous to those specified at the beginning of the clause? I am of opinion that it is not.”⁶⁶ A statute required a voting paper to contain the name of the street, lane, *or other place*, in which the property for which the voter appears to be rated on the burgess roll is situated. In *Regina v. Spratley*,⁶⁷ Lord Campbell, C. J., said: “Though I think that the ‘other place’ must be *ejusdem generis* with ‘street’ and ‘lane,’ I think that parish may, in some cases, be *ejusdem generis* with street or lane.”

§ 430 (276). *Same.*—The words “estate” or “effects,” and the like, if used in a clause containing an enumeration of personal estate, will generally be confined to estate or effects *ejusdem generis* with those specified as being the most natural, when unexplained by the context.⁶⁸ A person employed by a building-owner to erect a building adjoining the house of another is not an “other person” within the meaning of a statutory regulation which requires a month’s notice of action to be given before a writ or process is sued out against “any district surveyor or *other person* for anything done or intended under the provisions of the act.”⁶⁹ An act for keeping in repair a harbor imposed certain duties enumerated in a schedule annexed on goods exported and imported. In the schedule, under the head of “metals,” certain specified duties were imposed on “copper, brass, pewter and tin, and on *all other metals not enumerated*.” It was held that the latter words did not include gold and silver. The court in part put the decision in *Casher v. Holmes*⁷⁰ on the ground that the word “metals” in popular language does not include gold and silver, but they are spoken of as *precious metals*. Littledale, J., said: “I have no doubt that those words do not include gold and silver, but refer to metals *ejusdem generis* with others previously men-

⁶⁶ *Wanstead Board v. Hill*, 13 C. 46; *Stuart v. Earl of Bute*, 3 id. 212; *B. (N. S.)* 479. *Hotham v. Sutton*, 15 id. 320.

⁶⁷ 6 E. & B. at p. 367.

⁶⁹ *Williams v. Golding*, L. R. 1 C.

⁶⁸ *McIntyre v. Ingraham*, 35 Miss. P. 69.

25; *Rawlings v. Jennings*, 13 Ves. ⁷⁰ 2 B. & Ad. 592.

tioned under the head metal; and the metals *ejusdem generis*, and not already enumerated, can only be compound metals, and what were formerly called semi-metals." It was agreed by charter-party to load a ship with coal in regular and customary turn, "except in cases of riots, strikes or any other accidents beyond his [the contractor's] control," which might prevent or delay her loading. It was held that a snow-storm was not an accident within the exception.⁷¹

§ 431. Same.—A statute provided that "it shall not be lawful for the husband to rent the wife's plantation, houses, horses, mules, wagons, carts, or other implements, and with them, or *any of her means*, to operate and carry on business in his own name or on his own account." It was held the words "any of her means" meant other tangible property and did not include money.⁷² A statute declared it burglary to break and enter "any shop, store, booth, tent, warehouse or other building." Held "other building" did not include a barn⁷³ or a chicken house.⁷⁴ In a statute that "whoever entices or takes any female of previous chaste character from wherever she may be to a house of ill-fame, or elsewhere, for the purpose of prostitution shall be punished," etc., the words "or elsewhere" were held to mean some other place of like character where prostitution of the character practiced at houses of ill-fame is carried on.⁷⁵ A civil rights statute provided that all persons should "be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating-houses, barber shops, public conveyances on land and water, theaters, and all other places of public accommoda-

⁷¹ Fenwick v. Schmolz, L. R. 3 C. P. 313.

⁷² Leinkauf v. Banes, 66 Miss. 207, 5 So. 402.

⁷³ State v. South, 136 Mo. 673, 38 S. W. 716.

⁷⁴ State v. Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842. The

contrary was held under the Illinois statute. Gillock v. People, 171 Ill. 307, 49 N. E. 712. Under the same statute "other building" was held to include a hotel. Bruen v. State, 206 Ill. 417.

⁷⁵ Nichols v. State, 127 Ind. 406, 26 N. E. 839.

tion and amusement." The latter general words were held not to include a drug store.⁷⁶ An ordinance provided that no licensed liquor dealer should build or maintain "any stall, booth or other inclosure" of any kind in or connected with the room or place where liquor was sold. The general words were held not to forbid a toilet room or the inclosure of the bar, but to mean any inclosure which could be used for drinking or as a lounging place.⁷⁷

§ 432. Same.—An act imposing an annual license tax upon "hacks, cabs, omnibuses and other vehicles for transporting passengers for hire" was held not to include automobiles under the general words.⁷⁸ A city had power "to regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay and *any article of merchandise*." Held the italics should be restricted to things of like character with those enumerated and that the same did not include books and stationery.⁷⁹ A statute made it an offense to take and carry away from the land of another without his consent "any timber, wood, rails, fruit, vegetable, corn, cotton or any other article, thing, produce or property of any value whatever." The general words were held to mean things attached to, connected with, produced from or incident to the land and did not include personal property in a house, such as a dress.⁸⁰ An act exempted from taxation for ten years the machinery and property used for the manufacture of cotton and woollen goods and other fabrics, or for the making of all kinds of machinery or implements of husbandry, or all other things or articles not prohibited by law. It was held not to include an ice factory and bottling establishment.⁸¹

⁷⁶ Cecil v. Green, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566.

⁷⁷ State v. Barge, 82 Minn. 256, 84 N. W. 911, 1116, 53 L. R. A. 428.

⁷⁸ Washington Electric Vehicle Trans. Co. v. District of Columbia, 19 App. Cas. (D. C.) 462.

⁷⁹ Cairo v. Coleman, 53 Ill. App. 680.

⁸⁰ Grier v. State, 103 Ga. 428, 30 S. E. 255.

⁸¹ Greenville Ice & Coal Co. v. Greenville, 69 Miss. 86, 10 So. 574.

§ 433. Same.—An act made eight hours a legal day's work, in the absence of any contract on the subject, "in all mechanical trades, arts, and employments, and other cases of labor and services by the day," except in farm employments. It was held that the general words did not include special deputy sheriffs, and in giving its decision the court says: "The subjects embraced in the enumeration are limited, and consequently the general clause should also be limited to work and labor in the common industries of the people, and in no just sense could it be extended to include the services of the constabulary of the state whose duty it is to enforce the observance of the law, preserve the peace and protect property, a service involving in no proper significance any element of work or labor in the common acceptance of those words, but involves the idea of vigilance and discretion, fortitude and courage."⁸² An act limited actions against any sheriff, coroner or other officer for any act or default in office to three years. The words "other officer" were held not to include a public administrator.⁸³ A statute that "every dram-shop keeper or any other person" who shall sell any intoxicating liquor to a minor shall forfeit fifty dollars to the parent was held not to include a druggist, but to mean by the general words one who represented the dram-shop keeper or was temporarily in charge of his business.⁸⁴ An act for the incorporation of cities and villages gave power to "license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations." As the special words referred to those carrying for hire, the general words were held to embrace those engaged in like business, and so to include street railway companies.⁸⁵ An act provided for contesting the election of certain specified officers and contained a general provision, as follows: "The county

⁸² Philips v. Christian County, 87 Ill. App. 481, 484.

⁸³ State v. Ennis, 79 Mo. App. 12.

⁸⁴ Bachman v. Brown, 57 Mo. App. 68.

⁸⁵ Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451.

court shall hear and determine contests of election of all other county, township and precinct officers, and *all other officers* for the contesting of whose election no provision is made." The general words were held to include school district officers; the school district like the county, township and precinct being a *quasi*-municipal corporation.⁸⁶

§ 434. Same.—Power was granted to a corporation to take waters "for the extinguishment of fires, and for domestic, sanitary and other purposes." The last words were held to mean other *like* purposes, that is, for public purposes, and did not include manufacturing purposes.⁸⁷ An act making railroad property liable for state, county, town, village and school taxes, and taxes for the erection of public buildings and *for other purposes*, does not include special assessments, which are not of like kind with those specified.⁸⁸ An act was passed to protect dealers, bottlers and manufacturers of "mineral waters, soda waters, or any other beverages whatsoever." Held not to include a beverage known as "Dr. Harter's Wild Cherry Bitters."⁸⁹ A statute providing for an attachment in actions on promissory notes, bills of exchange and other instruments for the direct payment of money was held not to include appeal bonds.⁹⁰ An act provided that "any officer or person collecting or receiving any fines, forfeitures or other moneys," and failing to pay over the same, should forfeit double the amount and interest. The general words were held to mean other moneys of similar or like character and received from like sources, and not to include a general balance in the hands of a school treasurer.⁹¹ An act imposed a penalty upon any person "who displaces, removes, injures or destroys a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or

⁸⁶ *Misch v. Russell*, 136 Ill. 22, 26 N. E. 528, 12 L. R. A. 25.

⁸⁷ *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195.

⁸⁸ *McCutcheon v. Pacific R. Co.*, 72 Mo. App. 271.

⁸⁹ *State v. Dinnisse*, 109 Mo. 434, 19 S. W. 92.

⁹⁰ *Hurd v. McClellan*, 14 Colo. 213, 23 Pac. 792.

⁹¹ *People v. Dolan*, 5 Wyo. 245, 39 Pac. 752.

structure, or any part thereof, attached to, or appurtenant to, or connected with a railway." Held, under the rule of *ejusdem generis*, that the word "structure" must be construed to mean something connected with the track, and did not include a fence inclosing the right of way.⁹² A statute requiring the contract for the erection of a courthouse, jail or other county building to be let to the lowest bidder was held not to include a soldiers' monument.⁹³ An act made it arson to set fire to "any goods, wares or merchandise, or other chattels." Stacks of hay were held to be within the words "other chattels."⁹⁴ A justice of the peace was authorized to issue a search-warrant for counterfeit or spurious coin, forged bank notes or other forged instruments. Forged labels and trade-marks were held not to be within the statute.⁹⁵ A statute prescribed the form of ballot to be used "whenever a constitutional amendment or other public measure" is proposed to be voted upon. The claim was made that the general words could include only measures affecting all the people of the state, like a constitutional amendment. But they were held to include any measure affecting the public, as distinguished from matters of private concern. The rule of *ejusdem generis* was held to require no more than that the measures should be analogous to constitutional amendments, and changes in a county, town or city government were held to have such analogy: A proposition as to domestic animals running at large in a county was held to be within the statute.⁹⁶ An act punished an assault with intent to commit "murder, rape, mayhem, robbery, larceny or other felony." In construing this language the court said: "When a section, so far as it particularizes, has reference entirely to offenses committed

⁹² *State v. Walsh*, 43 Minn. 444, 45 N. W. 721.

⁹³ *Spangler v. Gallagher*, 182 Pa. St. 277, 37 Atl. 832; *Appeal of the Society of the Cincinnati*, 154 Pa. St. 621, 26 Atl. 647.

⁹⁴ *State v. Harvey*, 141 Mo. 343, 42 S. W. 938.

⁹⁵ *White v. Wagar*, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60.

⁹⁶ *Union County v. Ussery*, 147 Ill. 204, 35 N. E. 618.

with a deliberate intent, general language referring to any other felony in like manner has reference to offenses committed with premeditation or deliberate intent, that is, with what is included as legal premeditation or deliberation."⁹⁷ A statute made it a misdemeanor to unlawfully kill or abuse any horse, mule, sheep or *other cattle*. The italics were held to include all domestic quadrupeds and, in the particular case, goats.⁹⁸

§ 435 (277). **General words following particular will not include things of a superior class.**—There is this further restriction of general words following particular words, that the general words will not include any of a class superior to that to which the particular words belong.⁹⁹ A statute treating of deans, prebends *and others having spiritual promotion* was held not to extend to *bishops*, notwithstanding the generality of the latter words; for, if it had been otherwise intended, the superior persons would have been mentioned in the beginning of the sentence, and they cannot be implied.¹ Where the general words "all other metals" follow the particular words "copper, brass, pewter and tin," it was held in the case referred to that neither gold nor silver was included, they being of a superior kind to the particular metals enumerated.² "Abbots, priors, keepers of hospitals and other religious houses" do not include bishops, as they are superior to abbots.³ The statute of 31 Henry VIII., chapter 3, discharged from payment of tithes all lands which came to the crown by dissolution, renouncing, relinquishing, forfeiture, giving up, or by any other means. It had the effect to discharge from tithes land which came to the crown by these or by any other in-

⁹⁷ Moore v. People, 146 Ill. 600, 35 N. E. 166.

⁹⁸ State v. Groves, 119 N. C. 822, 25 S. E. 819.

⁹⁹ Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; Union County v. Ussery, 147 Ill. 204, 35 N. E. 618.

¹ Copland v. Powell, 1 Bing. 369; Chapman v. Woodruff, 34 Ga. 98.

² Casher v. Holmes, 2 B. & Ad. 592.

³ 2 Inst. 457, 478; Archbishop of Canterbury's Case, 2 Rep. 46a.

ferior means, but did not discharge therefrom land which came to the crown by an act of parliament, which is the highest manner of conveyance that can be.⁴ A statute relating to indictments before justices of the peace and "others having power to take indictments" was not understood to apply to the superior courts.⁵ The English statute which forbade salmon fishing in the waters of certain enumerated streams "and all other waters wherein salmon are taken" was considered as including only rivers inferior to those mentioned, and therefore as not comprising the Thames—*Thamasis nobile illud flumen*.⁶ A limitation act provided that "actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidence of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued." It was held that a judgment, though evidence of indebtedness in writing, being of a superior grade to the things enumerated, was not embraced by the general words.⁷

§ 436 (278). It is otherwise when this rule would leave the general words without effect.—But where the result of thus restricting the general words would be that they would have no effect at all, they must be extended to things superior in quality to those enumerated.⁸ This naturally proceeds from the rule of construction to give effect to all the words of a statute if possible, so that none will be void, superfluous or redundant.⁹ Thus the statute of Marlebridge, 52 Henry III., chapter 19, refers to courts baron or other courts, and it was held that these words extend to the courts of record at Westminster, though the act begins with inferior courts; "for otherwise these general words would be void; for it cannot, according to the general rule, extend to inferior courts, for none be inferior or lower than those that be particularly named."¹⁰ When a statute of limitation enu-

⁴ Id.

⁸ 1 Wilb. on St. 184.

⁵ Id.

⁹ See *ante*, § 369.

⁶ 2 Inst. 478.

¹⁰ Id.; 2 Inst. 137.

⁷ *Ambler v. People*, 139 Ill. 311,
28 N. E. 841, 32 Am. St. Rep. 202.

merated certain periods for bringing actions for inferior estates, and following the enumeration were these words, "or other action for any lands, tenements or hereditaments, or lease for a term of years," and under the general words it was sought to bring an action for a higher estate, it was recognized that as a general rule a statute which treats of things or persons of an inferior degree cannot by any general words be extended to those of a superior degree; yet when all those of an inferior degree are embraced by the express words used, and there are still general words, they must be applied to things of a higher degree than those enumerated, for otherwise there would be nothing for the general words to operate on.¹¹ Therefore these general words were held to include a real action.¹²

§ 437 (279). **Qualifications and exceptions to the rule of ejusdem generis.**—In cases coming within the reach of the principle of *ejusdem generis*, general words are read not according to their natural and usual sense, but are restricted to persons and things of the same kind or genus as those just enumerated; they are construed according to the more explicit context. This rule can be used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention or of confining the operation of a statute within narrower limits than was intended by the law-maker. It affords a mere suggestion to the judicial mind that where it clearly appears that the law-maker was thinking of a particular class of persons or objects, his words of more general description may not have been intended to embrace any other than those within the class. The suggestion is one of common sense. Other rules of construction are equally potent, especially the primary rule which suggests that the intent of the legislature is to be found in the ordinary meaning of the words of the statute.¹³

¹¹ *Ellis v. Murray*, 28 Miss. 129;
Dwar. on St. 758.

¹³ *Woodworth v. State*, 26 Ohio
St. 196; *Foster v. Blount*, 18 Ala.

¹² *Hall v. Byrne*, 1 Scam. 140; 687.

Woodworth v. Paine's Adm'r,
Breese (Ill.), 374.

The sense in which general words, or any words, are intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning will be given, according as the intention is thus indicated.¹⁴ The doctrine of *ejusdem gen-*

¹⁴ *McIntyre v. Ingraham*, 35 Miss. at p. 52; *Michel v. Michel*, 5 Madd. 72; *Hotham v. Sutton*, 15 Ves. 320; *Stuart v. Earl of Bute*, 3 id. 212.

In *Rex v. Shrewsbury*, 3 B. & Ad. 216, the question was whether a gas-light company was liable to be rated as occupiers of certain mains, pipes and other apparatus for conveying gas, under a statute which provided: "That the charges and expenses of lighting, paving, cleansing, watering, watching, widening, altering, improving and regulating the said streets, squares, highways, lanes and other public passages of the town of Shrewsbury, . . . shall at all times be borne and defrayed by the tenants or occupiers of all the houses, shops, malt-houses, granaries, warehouses, coach-houses, yards, gardens, garden grounds, stables, cellars, vaults, wharves and other buildings and hereditaments," etc. Meadow and pasture ground were excepted. The company's mains, pipes, etc., were held ratable. Lord Tenterden, C. J., remarked that the word "hereditament" was large enough to include the ground and soil in the several ways, lines and other places in which the pipes and apparatus belonging to this company are fixed, and he said: "But it is contended that the term as here used was to be construed with reference to the words among which it was found, and must be applied to heredita-

ments of the same kind as those particularly enumerated, such as coach-houses, gardens and so on; and reliance was placed on a case decided not long ago, *Rex v. The Proprietors of the Manchester and Salford Water-Works*, 1 B. & C. 630, where the word used was 'tenement,' which is also a term of very large import. In that case it was held by the court that the word should be restrained in construction to tenements of the same kind as the particular ones before enumerated; but there is in this act a circumstance which was not found in the other — the exception, namely, that the act shall not extend to meadows and pastures. Now it is certain that meadows and pastures would have fallen within the meaning of the word 'hereditament' if they had not been excepted; it was argued, therefore, that this special exemption of meadows and pastures showed that the other word had been previously used in a larger sense. On the other hand it was contended that these words had been introduced merely *ex majori cautela*. Upon the best consideration we have been able to give this case, we are of opinion that we ought not to consider the exception of meadow and pasture ground as made only for greater caution, but are bound to look upon it as introduced by way of special exception,

eris yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed.¹⁵ "But the doctrine of *ejusdem generis*," says the supreme court of Minnesota, "is but a rule of construction to aid in ascertaining the meaning of the legislature, and does not warrant a court in confining the operation of a statute within narrower limits than intended by the law-makers. The general object of an act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors."¹⁶ So the restriction of general words to things *ejusdem generis* must not be carried to such an excess as to deprive them of all meaning. The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called *ejusdem generis*.¹⁷ If the particular words exhaust a whole genus, the general words must refer to some larger genus.¹⁸ "If the particular words exhaust the genus, there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat

and so to construe the clause; and, consequently, everything not so specifically excepted must be understood to fall within the general liability."

¹⁵ *Hawke v. Dunn*, (1897) 1 Q. B. 579.

¹⁶ *Willis v. Mabon*, 48 Minn. 140, 156, 50 N. W. 1110, 31 Am. St. Rep. 626. To the same effect, *Webber v. Chicago*, 148 Ill. 313, 36 N. E. 70; *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995; *Gillock v. People*, 171 Ill. 307, 49 N. E. 712; *Board of Education v. Stollan*, 95 Ill. App. 250; *Winters v. Duluth*, 82 Minn. 127,

84 N. W. 788; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *Brown v. Heron Lake*, 67 Minn. 146, 69 N. W. 710; *St. Joseph v. Elliott*, 47 Mo. App. 418; *Lent v. Portland*, 42 Ore. 488, 71 Pac. 645.

¹⁷ 2 Inst. 185.

¹⁸ *Matthews v. Kimball*, 70 Ark. 451, 66 S. W. 651; *State v. Walker*, 123 Mo. 56, 27 S. W. 363; *National Bank of Commerce v. Ripley*, 161 Mo. 126, 61 S. W. 587; *State v. Woodman*, 26 Mont. 343, 67 Pac. 1118; *Fenwick v. Schmalz*, L. R. 3 C. P. at p. 316.

its own purpose.”¹⁹ The general words are not to be rejected, and the maxim *ejusdem generis* must yield to the maxim that every part of a statute should be upheld and given its appropriate effect, if possible.²⁰ To deny any word or phrase its known and natural meaning in any instance, the court ought to be quite sure that they are following the legislative intention.²¹ Hence, though a general term follows specific words, it will not be restricted by them when the object of the act and the intention is that the general word shall be understood in its ordinary sense. An instance is furnished by an act in South Carolina which subjected to punishment any person convicted of knowingly and wilfully packing or putting into any bag, bale or bales of cotton any stone, wood, trash cotton, cotton seed or any matter or thing whatsoever, . . . to the purpose or intent of cheating or defrauding any person, etc. The court held that the expression “any matter or thing whatsoever” was not restricted by the things enumerated. In this case the weight was fraudulently increased by use of water. “Here,” say the court, “there is no incongruity between the specifications and the general expression, and it cannot be doubted that it was the intention of the legislature to punish frauds in packing cotton without regard to the character of the material used.”²² These principles of construction and apparent exception to the maxim of *ejusdem generis* apply as well to criminal statutes as to others.²³

§ 438 (280). Same — Illustrations.—An act prescribed the fees of county judges and clerks of county courts, and made it an offense for either to receive any other or greater fees from any guardian, executor or administrator *or other*

¹⁹ National Bank of Commerce v. Ripley, 161 Mo. 126, 132, 61 S. W. 587.

²⁰ Misch v. Russell, 136 Ill. 22, 26 N. E. 523, 12 L. R. A. 25.

²¹ Lord Denman, C. J., in Tisdell v. Combs, 7 Ad. & E. at p. 796.

²² State v. Holman, 3 McCord,

306; Randolph v. State, 9 Tex. 521; State v. Williams, 2 Strob. 474; State v. Solomon, 33 Ind. 450.

²³ Maxwell v. People, 158 Ill. 248, 41 N. E. 995; Gillock v. People, 171 Ill. 307, 49 N. E. 712; State v. Holman, 3 McCord, 306.

person. In a prosecution against the clerk for excessive fees in a suit, and in answer to the contention that "other person" is only some one who has paid more or greater fees than are allowed by law in some matter relating to the administration of estates, the court, while recognizing the rule for limiting general words to persons and things *ejusdem generis*, said: "This is but a rule of construction by which courts are to ascertain the intention of the legislature, and when that is apparent we are bound by it, and can no more disregard the intention in the exposition of a penal statute than any other."²⁴ The court held that the true meaning of the act was to punish, as an offense, the taker of greater than the prescribed fees from any person. A statute enacted that "no house, office, room or other place shall be opened, kept or used" for the purpose of prohibited betting. A question came before the common bench whether betting under a clump of trees in Hyde Park was within the statute.²⁵ It was held to be so. Erle, C. J., said: "The mischief is to my mind precisely the same whether the party stands under the shelter of an oak tree, or of a roof or a covering of canvass; and I think the words are large enough to embrace it. . . . Beyond all doubt the mischief which the statute intended to remedy was that which was known to exist, viz.: the injury resulting to improvident persons by the opening of betting-houses or offices; but I think it was intended to go further and to prohibit the trade of betting wheresoever it might be carried on. If the prohibition had stopped at 'houses, offices and rooms,' certain persons, minded to carry on this traffic, would resort to trees in the park, and the legislature may well have thought that a practice which should be placed under control, and for that purpose inserted the general words." The exchequer chamber reversed this decision on the ground that the "place" should be one capable of having an owner. That court concurred in the view taken by the common pleas so far that the place being an open one, and not a "house," "office"

²⁴ *Foster v. Blount*, 18 Ala. 687. ²⁵ *Doggett v. Catterns*, 17 C. B. (N. S.) 669.

or "room," would not alone prevent it being a "place" within the statute.²⁶ It was held that a bicycle is not a "carriage" within the meaning of a turnpike act which scheduled animals and vehicles and defined tolls to be paid, and contained this paragraph: "For every carriage of whatever description and for whatever purpose which shall be drawn or impelled, or set or kept in motion, by steam or any other power or agency than being drawn by any horse or horses or other beast or beasts of draught, any sum not exceeding 5s."²⁷ A city charter granted authority to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or employment which it may deem proper, whether such person or employment be herein specially enumerated or not." And it was held not to empower the city to impose such tax upon a railroad corporation, for it is neither a person nor an employment within the ordinary acceptation of those words. This conclusion was aided by the consideration that such corporations are not *ejusdem generis* with the persons and employments specially enumerated. The court say, whilst the obvious import of the general words "is to extend the power of the city to tax other persons and employments than the enumerated classes, regardless of whether they are taxed by the state or not, it cannot be said to necessarily convey the idea that these new taxable subjects shall be different in character or higher in degree."²⁸ It was also held

²⁶ 19 C. B. (N. S.) 765; Haigh v. Corporation of Sheffield, L. R. 10 Q. B. 102. See Clark v. Hague, 2 E. & E. 281; Morley v. Greenhalgh, 3 B. & S. 374; Eastwood v. Miller, L. R. 9 Q. B. 440; Gallaway v. Maries, L. R. 8 Q. B. Div. 275; Shaw v. Morley, L. R. 3 Ex. 137; Bows v. Fenwick, L. R. 9 C. P. 339; Shillito v. Thompson, L. R. 1 Q. B. Div. 12.

²⁷ Williams v. Ellis, L. R. 5 Q. B. Div. 175.

²⁸ Lynchburg v. N. & W. R. R.

Co., 80 Va. 237, 56 Am. Rep. 592. Where, by statutory definition, the word "person" includes corporation, when applicable according to nature of the subject, a general power to levy tax upon "factors, brokers and vendors of lottery tickets, and upon agents and managers of gift enterprises, and upon all other persons exercising, within the city, any profession, trade or calling or business of any nature whatever," will authorize the city

when a particular class of persons or things is spoken of in a statute, and general words follow, the class first mentioned must be taken to be the most comprehensive and the general words treated as referring to matters *ejusdem generis* with that class; the effect of general words when they follow particular words being then restricted.²⁹

§ 439 (281). *Same.*—Where an act made it penal to convey to a prisoner, in order to facilitate his escape, “any mask, dress or disguise, or any letter, or any other article or thing,” the general words were construed without restriction on account of the preceding enumeration, and included a bar.³⁰ A statute enacted that it should be lawful for any two justices upon complaint made upon oath that there was cause to suspect that purloined or embezzled materials, used in certain manufactures, were concealed “in any dwelling-house, out-house, yard, garden, or other place or places,” to issue a search-warrant for the search there, with authority to deal with the person in whose house, etc., they were found. It was held³¹ “that a warehouse, occupied for business purposes only, and not within the curtilage of, or connected with, any dwelling-house, was ‘a place’ within the meaning of the statute.” Erle, J., said “the only point here is whether a warehouse is one of those ‘other places.’ In deciding that, we must construe the statute with reference to the object of the legislature in passing it.” The statute 15 and 16 Vict., ch. 81, § 2, empowered the justices of the county to appoint a committee of their body for the purpose of preparing a basis or standard for fair and equal county rates, to be founded on the full and fair annual value (interpreted by section 6 to mean the net annual value) of the property ratable to the poor rate, in every parish in the county. Section 5 empowered the committee to order in

to tax chartered banks therein to the extent that private bankers are taxed. *Macon v. Macon Savings Bank*, 60 Ga. 133.

²⁹ *Lynchburg v. N. & W. R. R. Co.*, 80 Va. 237, 56 Am. Rep. 592.

³⁰ *Reg. v. Payne*, L. R. 1 C. C. 27.

³¹ *Reg. v. Edmundson*, 2 El. & El.

writing certain specified parish officers and other persons, having the custody or management of any public or parochial rates or valuations of the parishes, to make written returns to the committee of the amount of the full and fair annual value of the property in any parish liable to be assessed toward the county rate; the date of the last valuation for the assessment of such parish; and the name of the surveyor or other person by whom such valuation was made. By section 7 the committee may, by their order in writing, require the "overseers of the poor, constables, the assessors, collectors, *and any other persons whomsoever*, to appear before them," "and to produce all parochial and other rates, assessments, valuations, apportionments, and other documents in their custody or power relating to the value of, or assessments on, all or any of the property within the several parishes, or which may be liable to be assessed toward the county rate; and to be examined under oath" "touching the said rates, assessments, valuations, or apportionments, or the value of property aforesaid." By another section neglect or refusal to comply subjected the delinquent to a penalty. It was held in *Regina v. Doubleday*,³² that section 7 authorized the committee to call before them all persons whomsoever able to give evidence of, and produce any documents relating to, the subjects mentioned, and did not restrict the committee to ascertaining by the examination of the persons, and the inspection of the documents specified in section 5, the amount at which the property is rated to the poor rate; that, therefore, a person having in his possession private accounts and documents relating to the annual value of collieries and coal mines assessable to the county rates and able to give evidence touching their net annual value incurred the penalty by refusing to obey the order of the committee. The general words were construed according to their ordinary meaning, unrestricted by the particular words which preceded them, because the purpose of the act obviously required it. So an act relating to nui-

³² 3 EL. & EL. 501.

sances, under which an inspector had a visitorial power, provided a penalty for preventing him "from entering any slaughter-house, shop, building, market or other place" where the things to be inspected were kept. It was held that a yard was "a place" within the meaning of the act. The court, in *Young v. Grattridge*,³³ expressed the opinion that it was not confined to places *ejusdem generis* with those mentioned, where animals, or carcasses, etc., to which the provisions of the act related, might be kept for sale or preparation for sale as food for man; "and I think," said Lush, J., "that there is nothing qualifying the generality of the term 'place,' and that a yard is within the term."

§ 440. *Same.*—A city charter contained a provision that the council "may assess all real property within such city, or within any district thereof, for the grading or otherwise improving streets and alleys, constructing sewers or making any local improvements of a public nature." It was held that, as the particular words exhausted the classes described, the general words must mean something different and were held to include a public park.³⁴ A statute forbade conducting games "for money, checks, credits, or any representative of value, or for any property or thing whatever." Running a slot machine for cigars was held to be within the statute. Referring to the rule of *ejusdem generis* the court says: "It is, however, but a rule of construction to be used as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention of a statute or of confining its operation to narrower limits than the legislature intended. It must be used in connection with other rules of importance, such as that the meaning of a statute is to be gathered from the language employed in it, and that every word of it must be taken in its ordinary signification, unless it was clearly the intention of the legislature, as gathered from the context, to restrict its meaning."³⁵ An assignment

³³ L. R. 4 Q. B. 166.

³⁵ *State v. Woodman*, 26 Mont.

³⁴ *Matthews v. Kimball*, 70 Ark. 348, 67 Pac. 1118.
451, 66 S. W. 651.

statute provided that any creditor who failed to present his claim according to the notice given, "on account of sickness, absence from the state, or any other good cause," might present it at any time before final dividend and participate in the dividends thereafter declared. The general words were held to mean what they said and not to be restricted by the particular words.³⁶ An ordinance provided for licensing "circuses, menageries, caravans, side-shows and concerts, minstrel or musical entertainments, given under a covering of canvas, exhibitions of monsters or of freaks of nature, variety and minstrel shows, athletic, ball or similar games of sport, and all other exhibitions, performances and entertainments not here enumerated, given in a building, hall, or under canvas or other cover, or within any inclosure." It was held to include horse races within an inclosure. The maxim of *ejusdem generis* was held to be only one of many rules of construction to ascertain the intent of the legislature, and "where, from the whole instrument, a larger intent may be gathered, the rule under consideration will not be applied to defeat such larger intent."³⁷ Where general words follow particular in the title of an act, the rule of *ejusdem generis* will not be applied to the general words, where the result would be to render the act invalid in whole or in part.³⁸ In the case referred to the expression "streets and other public grounds" was held to include public works and places of every kind, such as a pumping station. An insolvency act provided "that the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor or otherwise for the same debt." It was held that the release of a corporation did not discharge stockholders from their liability.³⁹

§ 441. Same.—An act made it a crime to exclude a person, on account of race or color, from the full and equal en-

³⁶ National Bank of Commerce v. Ripley, 161 Mo. 126, 61 S. W. 587.

³⁸ Winters v. Duluth, 82 Minn. 127, 84 N. W. 783.

³⁷ Webber v. Chicago, 148 Ill. 313, 36 N. E. 70.

³⁹ Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626.

joyment of inns, hotels, restaurants, barber shops, eating houses, soda water fountains, ice cream parlors or other places of public resort, refreshment, accommodation or entertainment. The general words were held not to include saloons, although they would seem to be *ejusdem generis*. This conclusion was based on the ground that the legislature would not have been likely to have omitted to specify so numerous a class as saloons if they had intended to include them, and on the further ground that it is the policy of the law to repress the liquor traffic, and that the legislature would not be likely to make it a crime to refuse any one a drink.⁴⁰ An act made it a misdemeanor wilfully to destroy or injure "any goods, wares, merchandise or other personal property of another." Held to include personal property of any and every kind and therefore a threshing machine.⁴¹ A statute providing for change of name applied to "any religious, benevolent, literary, scientific or other corporation, or any corporation having for its name, or using or being known by, a name of any benevolent or charitable order or society." It was held that the words "other corporation" were to be taken in their general sense and included a bank.⁴²

An act for the organization of corporations for business purposes specified the purposes for which they might be organized in eleven clauses or paragraphs. The first ten enumerated particular purposes, and the eleventh was "for any other purpose intended for pecuniary profit or gain not otherwise especially provided for, and not inconsistent with the constitution or laws of this state." It was held that the words were to be taken in the broad sense of their ordinary meaning. The court says: "Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, and not for the purpose of controlling the

⁴⁰ Rhone v. Loomis, 74 Minn. 200,
77 N. W. 31.

⁴² Matter of La Société Française,
123 Cal. 525, 56 Pac. 458.

⁴¹ State v. McLain, 92 Mo. App.
456.

intention or of confining the operation of a statute within narrower limits than was intended by the law-maker. . . . An examination of the preceding subdivision of the section will show that each class of business enumerated is entirely independent of the other, and of a wholly different nature, and most of them completely exhaust the class mentioned, and consequently leave no similar classes to which the general words in the last subdivision can apply. The general words, then, must be taken in their ordinary meaning, without regard to their connection with the preceding particular words.”⁴³

§ 442 (282). *Reddendo singula singulis*.—General words in a legislative act are often, where the sense requires it, and in furtherance of the intention, to be taken distributively, *reddendo singula singulis*. They are thus applied to the subject-matter to which they appear by the context most properly to relate, and to which they are really most applicable. Thus, the words “according to the provisions of said act, and of this act,” obviously import that the requisitions of the two acts (that act itself, and another thereinbefore mentioned), in their respective particulars, are to be duly complied with; as if the one under its circumstances requires signature to an instrument only, and the other that it be under hand and seal.⁴⁴ In the construction of the words, “for money or other good consideration paid or given,” “paid” is referred to “money” and “given” to “consideration.”⁴⁵ This method of limiting the effect of expressions which are obviously too wide to be construed literally is most frequently adopted when the opening words of a section are general, while the succeeding parts branch out into particular instances.⁴⁶ Where several words importing power, authority and obligation are found at the commencement of a clause containing several branches, it is not nec-

⁴³ *State v. Corkins*, 123 Mo. 56, 68, 27 S. W. 363.

⁴⁴ *Dwarris on St. 613; Rex v. In-*

habitants of Stoke Damerel, 7 B. & C. 570.

⁴⁵ *Dwarris on St. 613.*

⁴⁶ *Wilb. on St. 189.*

essary that each of those words should be applied to each of the different branches of the clause; it may be construed *reddendo singula singulis*; the words giving power and authority may be applicable to some branches, those of obligation to others.⁴⁷ Where the words were, "the finding of a cow by and on the land," the court said by Patterson, J.: "I think we must say, '*reddendo singula singulis*,' that the finding was to be 'on' the land while there was food on it, and by the owner of the land with hay, at other times."⁴⁸ Words in different parts of a statute must be referred to their proper connections, giving each in its place its proper force.⁴⁹ An act to prevent the spread of contagious and infectious diseases among swine provided in section 4 that any person *convicted* of violating section 2 or 3 should be punished in a certain manner and should be held liable in damages to the person or persons who may have suffered loss on account of such violation. It was held that a conviction was not essential to liability under the last clause, but that the word "conviction" was to be applied to the penal clause only.⁵⁰

§ 443 (283). Interpretation as affected by other statutes—Acts in *pari materia*.—All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively and construed together as though they constituted one act.⁵¹ This is true

⁴⁷ *Rex v. Bristol Dock Co.*, 6 B. & C., at pp. 191, 192; *Remillard v. Blackman*, 49 Minn. 490, 52 N. W. 133.

⁴⁸ *Dwarrison St.* 613; *Reg. v. Cumberworth Half*, 5 Q. B. 484, 491.

⁴⁹ *McIntyre v. Ingraham*, 35 Miss. 25.

⁵⁰ *Conrad v. Crowdson*, 75 Ill. App. 614.

⁵¹ *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724; *State v. Clark*, 54 Mo. 216; *Converse v. United States*, 21 How. 463, 16 L.

Ed. 192; *Jacoby v. Shafer*, 105 Pa. St. 610; *Neeld's Road*, 1 Pa. St. 353; *People v. Weston*, 3 Neb. 312; *Manuel v. Manuel*, 13 Ohio St. 458, 465; *Hendrix v. Rieman*, 6 Neb. 516; *State v. Babcock*, 21 Neb. 599, 31 N. W. 682; *Davidson v. Carson*, 1 Wash. Ty. 307; *United States v. Harris*, 1 Sumn. 21, Fed. Cas. No. 15,315; *Leroy v. Chabolla*, 2 Abb. (U. S.) 448, Fed. Cas. No. 8267; *Scott v. Searles*, 1 Sm. & Mar. 590; *White v. Johnson*, 23 Miss. 68; *Hayes v. Hanson*, 12 N. H. 284; *State v. Bal-*

whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day. They are all to be compared, harmonized if possible, and, if not susceptible of a construction which will make all of their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactment.

It is to be observed that in the comparison of different statutes passed at the same session or nearly at the same time this circumstance has weight; for it is usually referred to as indicating the prevalence of the same legislative purpose, as rendering it unlikely that any marked contrariety was intended. But whether the prior statute is recent or of long standing it must yield if there is a conflict. But with a view to ascertain the intent of the legislation on a given subject at any time it must all be considered, whether it has continued in force or been modified by successive changes.⁵²

“Statutes which are not inconsistent with one another, and which relate to the same subject-matter, are *in pari materia*, and should be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times.”⁵³ Acts

timore, etc. R. R. Co., 12 Gill & J. 399, 431, 38 Am. Dec. 317; McLaughlin v. Hoover, 1 Ore. 31; McFarland v. Bank of the State, 4 Ark. 410; Merrill v. Crossman, 68 Me. 412; Phelps v. Rightor, 9 Rob. (La.) 531; Earl of Ailsbury v. Pattison, 1 Doug. 28; Gayle's Heirs v. Williams' Adm'r, 7 La. 162; Perkins v. Perkins, 62 Barb. 531; Mayor, etc. v. Howard, 6 Har. & J. 383; State v. Mooty, 3 Hill (S. C.), 187; Black v. Tricker, 59 Pa. St. 13; Green v. Commonwealth, 12 Allen, 155; Van Riper v. Essex P. R. Bd., 38 N. J. L. 23; Dugan v. Gittings, 3 Gill, 138; State v. Mister, 5 Md. 11; Mobile,

etc. R. R. Co. v. Malone, 46 Ala. 391; Crawford v. Tyson, id. 299; Griffith v. Carter, 8 Kan. 565; Mitchell v. Duncan, 7 Fla. 13; Bryan v. Dennis, 4 id. 445; Rex v. Palmer, 1 Leach, C. C. 352; McWilliam v. Adams, 1 Macq. H. L. Cas. 120; Eskridge v. McGruder, 45 Miss. 294; 6 Bac. Abr. 382, 383; Mt. Holly Paper Co.'s Appeal, 99 Pa. St. 513; Bowles v. Cochran, 93 N. C. 398; Whipple v. Judge, etc., 26 Mich. 345; Storm v. Cotzhausen, 38 Wis. 139.

⁵² Id.

⁵³ Mitchell v. Witt, 98 Va. 459, 36 S. E. 528.

in pari materia should be construed together and so as to harmonize and give effect to their various provisions.⁵⁴ This is especially the case when the acts are passed at the same

- ⁵⁴ *Beavers v. State*, 60 Ark. 124, 29 S. W. 144; *Gleason v. Spray*, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47; *Irelan v. Colgan*, 96 Cal. 413, 31 Pac. 294; *In re Burdick*, 112 Cal. 387, 44 Pac. 734; *Freman v. Marshall*, 137 Cal. 159, 69 Pac. 986; *German Savings & L. Ass'n v. Ramish*, 138 Cal. 120, 69 Pac. 89; *Brown's Appeal*, 72 Conn. 143, 44 Atl. 22, 49 L. R. A. 144; *Ex parte Redmond*, 3 App. Cas. (D. C.) 317; *State v. County Commissioners*, 28 Fla. 793, 10 So. 14; *Henry v. Mayor*, 91 Ga. 268, 18 S. E. 143; *Macon Sash, Door & Lumber Co. v. Macon*, 96 Ga. 23, 23 S. E. 120; *Rockhold v. Canton Masonic Mut. Benefit Soc.*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420; *Chicago, etc. R. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. 513; *Soby v. People*, 134 Ill. 66, 25 N. E. 109; *Hronek v. People*, 134 Ill. 139, 24 N. E. 861, 8 L. R. A. 837; *Illinois Watch Case Co. v. Pearson*, 140 Ill. 423, 31 N. E. 400, 16 L. R. A. 429; *Commissioners of Highways v. Jackson*, 165 Ill. 17, 45 N. E. 1000; *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553; *South Park Commissioners v. First National Bank*, 177 Ill. 234, 52 N. E. 365; *Matter of Landfield*, 182 Ill. 264, 55 N. E. 371; *Board of Supervisors v. People*, 49 Ill. App. 369; *Hewitt v. Watertown Steam Engine Co.*, 65 Ill. App. 153; *MacVeagh v. Royston*, 71 Ill. App. 617; *S. C. affirmed*, 172 Ill. 515, 50 N. E. 153; *Redpath v. People*, 84 Ill. App. 509; *Consolidated Coal Co. v. Gruber*, 91 Ill. App. 15; *Hall v. Craig*, 125 Ind. 523, 25 N. E. 538; *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469; *Conn v. Board of Commissioners*, 151 Ind. 517, 51 N. E. 1062; *Chicago & Eastern Ill. R. R. Co. v. State*, 153 Ind. 134, 51 N. E. 924; *Elliott v. Brazil Block Coal Co.*, 25 Ind. App. 592, 58 N. E. 736; *Hancock v. District Township*, 78 Iowa, 550, 43 N. W. 527; *Beatty v. Commonwealth*, 91 Ky. 313, 15 S. W. 856; *George v. Lillard*, 106 Ky. 820, 51 S. W. 793; *Danville v. Fiscal Court*, 21 Ky. L. R. 196, 51 S. W. 157; *Commonwealth v. Barney*, 24 Ky. L. R. 2352; *Cummings v. Everett*, 82 Me. 260, 19 Atl. 456; *Gray v. County Commissioners*, 83 Me. 429, 22 Atl. 376; *Anderson v. Seymour*, 70 Minn. 358, 73 N. W. 171; *Vega Steamship Co. v. Consolidated Elevator Co.*, 75 Minn. 308, 77 N. W. 973, 74 Am. St. Rep. 484, 43 L. R. A. 843; *Palmer v. Zumbrota*, 72 Minn. 266, 75 N. W. 380; *Loper v. State*, 82 Minn. 71, 84 N. W. 650; *Clements v. Anderson*, 46 Miss. 598; *Biloxi v. Borries*, 78 Miss. 657, 29 So. 466; *Kane v. Kansas City, etc. Ry. Co.*, 112 Mo. 34, 20 S. W. 532; *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13; *State v. Slover*, 126 Mo. 652, 29 S. W. 718; *State v. Woodson*, 128 Mo. 497, 31 S. W. 105; *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649; *Andrew County v. Schell*, 135 Mo. 31, 36 S. W. 206; *Sales v. Barber Asphalt Pav. Co.*, 166 Mo. 671,

session.⁵⁵ "It is to be presumed that different acts passed at the same session of the legislature are imbued by the same spirit and actuated by the same policy and they should be construed each in the light of the other."⁵⁶ Statutes constituting a system should be so construed as to make that system consistent in all its parts and uniform in its opera-

66 S. W. 979; *State v. Downs*, 164 Mo. 471, 65 S. W. 258; *Curtwright v. Crow*, 44 Mo. App. 563; *Kansas City Hydraulic Press Brick Co. v. Barber*, 50 Mo. App. 60; *Lang v. Calloway*, 68 Mo. App. 393; *Step-pacher v. McClure*, 75 Mo. App. 135; *Lewis v. Gill*, 76 Mo. App. 504; *Brennan v. McMenamy*, 78 Mo. App. 122; *State v. Ebbs*, 89 Mo. App. 95; *Dinkins v. Gottselig*, 90 Mo. App. 639; *Green v. Baxter*, 91 Mo. App. 633; *Rosenberger v. Mal-ler-son*, 92 Mo. App. 27; *Peters v. Vawter*, 10 Mont. 201, 25 Pac. 438; *State v. Rotwitt*, 17 Mont. 41, 41 Pac. 1004; *State v. Page*, 20 Mont. 238, 50 Pac. 719; *State v. Baushausen*, 49 Neb. 558, 68 N. W. 950; *Dawson County v. Clark*, 58 Neb. 756, 79 N. W. 822; *Chicago, R. I. & P. R. R. Co. v. Zerneck*, 59 Neb. 689, 82 N. W. 26; *Chicago, R. I. & P. R. R. Co. v. Eaton*, 59 Neb. 698, 82 N. W. 1119; *State v. Donnelly*, 20 Nev. 214, 19 Pac. 680; *Blackwell v. First Na-tional Bank*, 10 N. M. 555, — Pac. —; *Matter of Livingston*, 121 N. Y. 94, 24 N. E. 290; *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417; *Walser v. Jordan*, 124 N. C. 683, 33 S. E. 139; *Vermont Loan & Trust Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318; *Doyle v. Doyle*, 50 Ohio St. 330, 34 N. E. 166; *Stone v. Doster*, 7 Ohio C. C. 8; *Lloyd v. Dollison*, 13 Ohio C. D. 571; *Hess v. Trigg*, 8

Okl. 286, 57 Pac. 159; *Davey v. Ruf-fell*, 162 Pa. St. 443, 29 Atl. 894; *State v. Covington*, 35 S. C. 245, 14 S. E. 499; *Williams v. McLendon*, 44 S. C. 174, 21 S. E. 616; *Harris v. State*, 96 Tenn. 496, 34 S. W. 1017; *Illinois Central R. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041; *Farmer v. Shaw*, 93 Tex. 438, 55 S. W. 1115; *Matter of Gannett*, 11 Utah, 283, 39 Pac. 496; *Town School District v. School District*, 72 Vt. 451, 48 Atl. 697; *Offield v. Davis*, 100 Va. 250, 40 S. E. 910; *In re Wilbers' Estate*, 14 Wash. 242, 44 Pac. 262; *District of Columbia v. Hutton*, 143 U. S. 18, 12 S. C. Rep. 369, 36 L. Ed. 60; *Chappell v. United States*, 81 Fed. 764, 26 C. C. A. 600.

⁵⁵ *Illinois Watch Case Co. v. Pear-son*, 140 Ill. 423, 31 N. E. 400, 16 L. R. A. 429; *Curtwright v. Crow*, 44 Mo. App. 563; *Lang v. Calloway*, 68 Mo. App. 393; *State v. Rotwitt*, 17 Mont. 41, 41 Pac. 1004; *State v. Donnelly*, 20 Nev. 214, 19 Pac. 680; *Blackwell v. First National Bank*, 10 N. M. 555, — Pac. —; *Walser v. Jordan*, 124 N. C. 683, 33 S. E. 139; *Hess v. Trigg*, 8 Okl. 286, 57 Pac. 159; *Matter of Gannett*, 11 Utah, 283, 39 Pac. 496; *Town School Dis-trict v. School District*, 72 Vt. 451, 48 Atl. 697; *Sprague v. Baldwin*, 18 Pa. Co. Ct. 568.

⁵⁶ *Houston & Tex. Cent. Ry. Co. v. State*, 95 Tex. 507, 523, 63 S. W. 114.

tion.⁵⁷ As said by the supreme court of Massachusetts: "Where statutes are part of a general system relating to the same class of subjects, and rest upon the same reason, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish."⁵⁸

A statute must be construed with reference to the whole system of which it forms a part.⁵⁹ And statutes upon cognate subjects may be referred to, though not strictly *in pari materia*.⁶⁰

§ 444 (284). **Same—Illustrations.**—There being a general statute regulating the execution of wills which did not require subscribing witnesses, a new statute was passed providing for the testamentary disposition of the property of married women; it required that such a will should be executed in the presence of two witnesses. The two acts were construed together. A married woman's will had to be executed according to the general law except in the particular regulated by the later act in respect to witnesses.⁶¹ The existing requirements of the law relative to auditing accounts for state printing were held not to be repealed or such audit dispensed with by a later act providing for par-

⁵⁷ *Harris v. State*, 96 Tenn. 496, 34 S. W. 1017; *Board of Supervisors v. People*, 49 Ill. App. 369; *MacVeagh v. Royston*, 71 Ill. App. 617; S. C. affirmed, 172 Ill. 515, 50 N. E. 153; *Conn. v. Board of Commissioners*, 151 Ind. 517, 51 N. E. 1062; *Cincinnati v. Conover*, 55 Ohio St. 82, 44 N. E. 582. In the last case the court says: "It is to be presumed that a code of statutes relating to one subject was governed by one spirit and policy, and intended to be consistent and harmonious in its several parts. And where in a code or system of laws relating to a particular subject, a general policy is plainly declared, special provisions should, when possible, be

given a construction which will bring them in harmony with that policy." p. 89.

⁵⁸ *Sheldon v. Boston & A. R. R. Co.*, 172 Mass. 180, 182, 51 N. E. 1078.

⁵⁹ *McDougald v. Dougherty*, 14 Ga. 674; *Noble v. State*, 1 Greene (Iowa), 325; *Hays v. Richardson*, 1 Gill & J. 366.

⁶⁰ *Smith v. People*, 47 N. Y. 330; *Whitcomb v. Rood*, 20 Vt. 49; *Ireland v. Colgan*, 96 Cal. 413, 31 Pac. 294; *Cummings v. Everett*, 82 Me. 260, 19 Atl. 456; *State v. Woodson*, 128 Mo. 497, 31 S. W. 105; *State v. Beck*, 21 R. I. 288, 43 Atl. 366, 45 L. R. A. 269.

⁶¹ *Linton's Appeal*, 104 Pa. St. 228.

tial payments during the progress of a particular work in terms which implied no such prior audit.⁶² Though a new statute prescribing the steps for taking an appeal is general and makes no exceptions, it will be construed with any existing law covering the same subject and containing an exception, for obvious reasons, in favor of parties who are such in a representative capacity.⁶³ The general terms of a later statute will often be restricted where, by prior laws, subjects naturally falling within such general terms have been classified and made subject to distinct and dissimilar regulations. The later law, not showing any purpose to abolish this classification, will be made to operate on that class alone to which by its terms it is applicable.⁶⁴

§ 445 (285). *Same.*—The expression “any person” in a later statute will be construed to harmonize with an earlier one which required for the purpose certain qualifications.⁶⁵ Where two acts had required certain sums to be paid into the state treasury by a city, and gave a court jurisdiction to enforce the payment, and afterwards another act required an additional payment, thereby increasing the aggregate, but was silent as to the mode of enforcing it, it was held that as the later act was merely supplemental to the others, the remedy given by them should be deemed applicable to the latter.⁶⁶ An offense defined in a statute of Massachusetts was punishable by a fine not exceeding \$1,000, or by imprisonment in jail not exceeding one year. A subsequent act conferred on the police court jurisdiction of the offense, which was to be concurrent with that of another court, and provided that when the police court exercised final jurisdiction the punishment should be confined to a fine not exceeding \$100, and imprisonment not exceeding one year. It was held that though the latter act, taken by

⁶² *People v. Weston*, 3 Neb. 312.

⁶⁵ *London Tobacco Pipe Makers*

⁶³ *Koontz v. Howsare*, 100 Pa. St. 506.

v. Woodroffe, 7 B. & C. 838.

⁶⁴ *People v. Molyneux*, 40 N. Y. 113; *Bishop v. Barton*. 2 Hun, 436.

⁶⁶ *City of Louisville v. Commonwealth*, 9 Dana, 70, 75.

itself, would seem to authorize both fine and imprisonment, the language being conjunctive, yet when both acts are construed together it is obvious that the latter authorizes a fine and also authorizes imprisonment, but not both in one sentence.⁶⁷

§ 446. Same.—A statute provided as follows: "A judgment that the defendant pay a fine and costs may also direct that he be imprisoned until both fine and costs are satisfied, specifying the extent of the imprisonment, which must not exceed one day for every two dollars of the fine and costs." A later statute provided that every one convicted of gambling must be imprisoned until his fine and costs are *paid*. This was construed with the former act and the word "paid" was held to mean *satisfied* by imprisonment at the rate of \$2 a day.⁶⁸ An act to regulate the manufacture, transportation, use and sale of explosives provided that one who violated the act should "be deemed guilty of a felony," and, upon conviction, should be punished by imprisonment for a term of not less than five nor more than twenty-five years, but did not say where the imprisonment should be. The criminal code declared a felony to be a crime punishable by imprisonment in the penitentiary. It was held that the two should be construed together, and that, as so construed, the imprisonment prescribed by the former act was intended to be in the penitentiary.⁶⁹ An act was entitled "An act to make it unlawful for a person to fraudulently dispose of the property of another and to provide a punishment therefor." The act provided "that any person who shall sell, dispose of, or convert to his or her own use, or the use of another, any money, property or other thing of value, without the consent of the owner thereof, shall be punished," etc. It was held that the statute should be construed in connection with

⁶⁷ Commonwealth v. Griffin, 105 Mass. 185.

⁶⁹ Hronek v. People, 134 Ill. 139, 24 N. E. 861, 8 L. R. A. 837.

⁶⁸ State v. Turner, 26 Mont. 339, 67 Pac. 1004.

the statutes against robbery, larceny, horse stealing, obtaining property under false pretenses and other similar statutes, and it was held to apply only to persons in possession of the property of another by virtue of some fiduciary relation, thus greatly restraining and qualifying the words of the act.⁷⁰ Additional illustrations of the same mode of construction are referred to in the margin.⁷¹

⁷⁰ *Commonwealth v. Barney*, 24 Ky. L. R. 2352, 74 S. W. 181. The court says: "At first reading this statute may appear plain enough. But it must be studied, because practically it must be applied in connection with other statutes of the state. All criminal laws are necessarily enacted to remedy some evil existing or anticipated. Such was the situation which the legislature had in mind, that it must be deemed to have taken a comprehensive survey not alone of the hurtful thing to be corrected, but of the laws already in force tending to, but which had not fully served that end. . . . It may be said that the work of interpretation must be confined to the construction of the words of the act. But that manifestly falls short of the true office of the courts. The legislature has used certain language to express its purpose. It is the purpose, then, that must be sought for. It will be presumed at the beginning of such an inquiry that the language used will probably best show that purpose. But if it undoubtedly does not, then to stop further inquiry is to probably misapply the legislative will, falling short of its purpose, and, may be, work a positive and unthought of public evil. The

courts, with due regard to the prerogatives of a co-ordinate branch of the government, approach this duty with caution, and with a proper appreciation of the distribution of the powers of the government. But statutes of doubtful meaning must be interpreted, or be subject to final interpretation, in event of controversy as to their true meaning, by the courts established by the organic law for that purpose. The evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject, are all properly considered by the courts in arriving at the legislative intention, because the legislature must have resorted to the same means to arrive at its purpose."

⁷¹ *Cummings v. Everett*, 82 Me. 260, 19 Atl. 456; *Kane v. Kansas City, etc. Ry. Co.*, 112 Mo. 34, 20 S. W. 532; *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13; *State v. Woodson*, 128 Mo. 497, 31 S. W. 105; *Step-pacher v. McClure*, 75 Mo. App. 135; *Lowry v. Collateral Loan Ass'n*, 172 N. Y. 394, 65 N. E. 206; *Matter of New York & L. I. Bridge Co.*, 54 Hun, 400, 7 N. Y. S. 445; *Doyle v. Doyle*, 50 Ohio St. 330, 34 N. E. 166; *Vermont Loan & T. Co. v. Whit-*

§ 447 (286, 287). *Same.*— While it is thus true that statutes relating to the same subject are to be construed together, this rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous statutes, where such language requires such policy to be disregarded.⁷² Where the last statute is complete in itself, and intended to prescribe the only rule to be observed, it will not be modified by the displaced legislation, as laws *in pari materia*.⁷³

The legislature are presumed to know existing statutes, and the state of the law, relating to the subjects with which they deal. Hence, that they would expressly abrogate any prior statutes which are intended to be repealed by new legislation. Where there is no express repeal none is deemed to be intended, unless there is such an inconsistency as precludes this assumption; then it yields only to the extent of the conflict.⁷⁴ Regard must be had to all the parts of a statute, and to the other concurrent legislation *in pari materia*; and the whole should, if possible, be made to harmonize; and if the sense be doubtful, such construction should be given, if it can be, as will not conflict with the general principles of law, which it may be assumed the legislature would not intend to disregard or change.⁷⁵ The statute of wills in New York prohibited a devise to a corporation. A subsequent act incorporating an orphan asylum society gave it power to purchase real estate. This act was harmonized with the statute of wills by restricting the right of purchase according to the popular sense of that word. Although

hed, 2 N. D. 82, 49 N. W. 318; State v. Downs, 164 Mo. 471, 65 S. W. 258.

⁷² Goodrich v. Russell, 42 N. Y. 177, 184; State v. Cram, 16 Wis. 343, 347.

⁷³ Sutton v. Hays, 17 Ark. 462; Williams v. Beard, 1 Rich. (N. S.) 309.

⁷⁴ *Ante*, § 247; White v. Johnson, 23 Miss. 68; State v. Commissioner of R. R. Taxation, 87 N. J. L. 228; Wakefield v. Phelps, 37 N. H. 295; Laughter v. Seela, 59 Tex. 177; Austin v. Gulf, etc. R. R. Co., 45 Tex. 234; Lewis v. Aylott, *id.* 190.

⁷⁵ Manuel v. Manuel, 13 Ohio St. 458, 465.

technically a title by devise is by purchase, it was deemed more congenial to the spirit of both acts to give the word "purchase" a restricted meaning in harmony with the prohibition.⁷⁶ Provisions not repealed expressly or by such implication continue to operate, but they may be modified by later legislation, which will have the effect expressly or by like implication of extending or restricting their terms or scope.⁷⁷

§ 448 (288). *Same.*—Where enactments separately made are read *in pari materia*, they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system.⁷⁸ Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions.⁷⁹ For the purpose of learning the intention, all statutes relating

⁷⁶ *McCartee v. Orphan Asylum Society*, 9 Cow. 437, 506, 18 Am. Dec. 516. See *Dodge v. Gridley*, 10 Ohio, 173.

⁷⁷ *Noble v. State*, 1 Greene (Iowa), 325.

⁷⁸ *State v. Williams*, 13 S. C. 558.

⁷⁹ 1 Kent's Com. 463, 464; *State v. Baltimore, etc. R. R. Co.*, 12 Gill & J. 399, 433, 38 Am. Dec. 317; *Napier v. Hodges*, 31 Tex. 287; *Wakefield v. Phelps*, 37 N. H. 295; *Mayor, etc. v. Howard*, 6 Har. & J. 383; *Church v. Crocker*, 3 Mass. 21; *Thayer v. Dudley*, id. 296; *Holbrook v. Holbrook*, 1 Pick. 254; *Mendon v. Wor-*

cester, 10 id. 235; *Commonwealth v. Martin*, 17 Mass. 362; *Forqueran v. Donnally*, 7 W. Va. 114; *Hayes v. Hanson*, 12 N. H. 284; *Earl of Ailesbury v. Patterson*, 1 Doug. 28; *Harrison v. Walker*, 1 Ga. 32; *Coleman v. Davidson Academy*, *Cooke* (Tenn.), 258; *State v. Bell*, 3 Ired. L. 506; *Henry v. Tilson*, 17 Vt. 479; *Fort v. Burch*, 6 Barb. 60; *Smith v. Hickman's Heirs*, *Cooke* (Tenn.), 330; *Ranoul v. Griffie*, 3 Md. 54; *McWilliam v. Adams*, 1 Macq. H. L. Cas. 120; *Copeland, Ex parte*, 2 DeG. M. & G. 914.

to the same subject are to be compared, and so far as still in force brought into harmony, if possible, by interpretation, though they may not refer to each other, even after some of them have expired or been repealed.⁸⁰ An amendatory act and the act amended are to be construed as one statute, and no portion of either is to be held inoperative if it can be sustained without wresting words from their appropriate meaning.⁸¹ Where a statute is made in addition to another statute on the same subject, without repealing any part of it, the provisions of both must be construed together.⁸²

§ 449. When statutes are in *pari materia*.—A statute authorizing the revival of actions by or against the representative or successor in interest of the party deceased is *in pari materia* with other statutes providing for the appointment of executors and administrators, and also those pointing out how foreign representatives may acquire the right to prosecute actions.⁸³ A statute relating to homestead and exemptions for a family of minor children was held *in pari materia* with laws allowing dower to the widow and minor children.⁸⁴ A statute in relation to attachments against steamboats and other water craft is *in pari materia* with the general attachment law, and they should be construed together.⁸⁵ Revenue statutes and criminal statutes as to the return of property for taxation are *in pari materia*.⁸⁶ So of all laws relating to elections and to ascertaining the result thereof;⁸⁷ all laws relating to the drawing and paying of county warrants and to the funds out of which they are payable;⁸⁸ laws relating to the condemnation of property and the procedure therein;⁸⁹ various statutes relat-

⁸⁰ Id.

⁸¹ Harrell v. Harrell, 8 Fla. 46; McFate's Appeal, 105 Pa. St. 323; Mitchell v. Duncan, 7 Fla. 13.

⁸² Pearce v. Atwood, 13 Mass. 324, 344; Reg. v. Tonbridge Overseers, L. R. 13 Q. B. Div. 342; Van Riper v. Essex P. R. Board, 38 N. J. L. 23.

⁸³ Hendrix v. Rieman, 6 Neb. 516.

⁸⁴ Roff v. Johnson, 40 Ga. 555.

⁸⁵ Wallace v. Seales, 36 Miss. 53.

⁸⁶ State v. Ebbs, 89 Mo. App. 95.

⁸⁷ State v. Slover, 126 Mo. 652, 29 S. W. 718.

⁸⁸ Andrew County v. Schell, 135 Mo. 31, 36 S. W. 206.

⁸⁹ Chappell v. United States, 81 Fed. 764, 26 C. C. A. 600.

ing to taxation,⁹⁰ and all statutes on the subject of death by wrongful act.⁹¹

An act is not *in pari materia* though it may incidentally refer to the same subject, if its scope and aim are distinct and unconnected.⁹² Thus a statute in relation to the confinement of stock to prevent its running on the premises of others was held not *in pari materia* with the provision of the code laying down the rule of diligence to be observed by railroad companies in running their trains and defining their liabilities in cases where stock is killed.⁹³ And where there are two complete and independent acts relating to a subject, such as drainage, the two are not to be construed together or commingled, and proceedings must be under one or the other.⁹⁴

§ 450. **Resort to original acts in case of revisions and codifications.**—It has been held in a number of cases that if a revision or code is plain and unambiguous it must be construed by itself and without resort to the original or prior acts which have been brought into it.⁹⁵ In *Rathbone v. Hamilton*,⁹⁶ the supreme court of the United States says: "The general rule is perfectly well settled that where a

⁹⁰ *State v. Covington*, 35 S. C. 245, 14 S. E. 499.

⁹¹ *Elliott v. Brazil Block Coal Co.*, 25 Ind. App. 592, 58 N. E. 736.

⁹² *Central R. R. Co. v. Hamilton*, 71 Ga. 465; *Billingslea v. Baldwin*, 23 Md. 85.

⁹³ *Central R. R. Co. v. Hamilton*, 71 Ga. 465. See also *State v. Miller*, 140 Ind. 168, 39 N. E. 148.

⁹⁴ *Gauen v. Moredock Drainage District*, 131 Ill. 446, 28 N. E. 633; *Story v. De Armond*, 179 Ill. 510, 53 N. E. 990.

⁹⁵ *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 15 S. C. Rep. 508, 39 L. Ed. 601; *Hamilton v. Rathbone*, 175 U. S. 414, 20 S. C. Rep. 155, 44 L. Ed. 219; *Rathbone*

v. Hamilton, 4 App. Cas. (D. C.) 475; *United States v. North Am. Commercial Co.*, 74 Fed. 145; *Robinson v. Canadian Pac. Ry. Co.*, (1892) A. C. 481; *Bank of England v. Vagliano Bros.*, (1891) A. C. 107, 145.

⁹⁶ 175 U. S. 414, 20 S. C. Rep. 155, 44 L. Ed. 219, citing *United States v. Hirsch*, 100 U. S. 33, 25 L. Ed. 539; *United States v. Bowen*, 100 U. S. 508, 25 L. Ed. 631; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54, 6 S. C. Rep. 929, 30 L. Ed. 60; *Deffebach v. Hawke*, 115 U. S. 392, 6 S. C. Rep. 95, 29 L. Ed. 423; *United States v. Averill*, 130 U. S. 335, 9 S. C. Rep. 546, 32 L. Ed. 977.

statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it to determine its proper construction. But where the act is clear upon its face, and when standing alone is fairly susceptible of but one construction, that construction must be given to it. . . . Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to to *solve*, but not to *create*, an ambiguity. If section 728 were an original act there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation. The word 'property' used in section 728 includes every right and interest which a person has in lands and chattels, and is broad enough to include everything which one person can own and transfer to another. The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume without the necessity of referring to prior statutes on the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior statutes at large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject."

In the case referred to the court considered the following facts: Section 1 of an act of congress of 1869 relating to the District of Columbia was as follows: "That in the District of Columbia the right of any married woman to any prop-

erty, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts, but such married woman may convey, devise or bequeath the same, or any interest therein, in the same manner and with like effect as if she were unmarried." In the Revised Statutes of the District of Columbia the fore part of this section down to the semicolon became § 727 without change, except that the word "unmarried" was substituted for "*feme sole*." The remainder of the section became § 728 of the revision and read as follows: "Any married woman may convey, devise and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried." It was held that the latter section applied to all her property, whether derived from her husband or not, though the original law clearly excluded property so derived. It thus appears that there was a slight change in the language of the statute as well as in its form.

§ 451. Same.— On the other hand the mere re-enactment of a statute in a code or revision has been held not to change its meaning, construction or effect.⁹⁷ And this is

⁹⁷ *Comer v. State*, 103 Ga. 69, 29 S. E. 501; *Grier v. State*, 103 Ga. 428, 30 S. E. 255; *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258; *Tise v. Shaw*, 68 Md. 1, 11 Atl. 363; *Hooper v. Creager*, 84 Md. 195, 35 Atl. 967, 35 L. R. A. 202; *Paddock v. Missouri Pac. Ry. Co.*, 155 Mo. 524, 56 S. W. 453; *Aloe v. Fidelity Mut. Life Ass'n*, 164 Mo. 675, 55 S. W. 993; *McGrew v. Missouri Pac. Ry. Co.*, 87 Mo. App. 250; *Rosenberger v. Mallerson*, 92 Mo. App. 27; *ante*, §§ 403, 238, 273, 281. And the original act may be resorted to for the purpose of ascertaining the meaning to be given the act in its new relation. *Constitution Pub. Co. v. DeLaughter*, 95 Ga. 17, 21 S. E. 1000; *State v. McMillan*, 69 Vt. 105, 37 Atl. 278; *Matter of Gihon*, 48 App. Div. 598, 62 N. Y. S. 426; *The Conqueror*, 166 U. S. 110, 17 S. C. Rep. 510, 41 L. Ed. 937. In *Cummings v. Everett*, 82 Me. 216, 19 Atl. 456, the court says: "In our efforts to ascertain the meaning of any section or clause, we should resort to the original statute from which it was condensed and search

held to be true though the sections of an act are separated and arranged in different connections.⁹⁸ Where the general language of an act is restrained by its title it will have the same limited meaning when incorporated into a code without the title.⁹⁹ Where a later statute repealed by implication a provision in a prior statute and afterwards both statutes were incorporated into, and re-enacted, without change, as parts of a revision, it was held that the re-enactment of the repealed provision was an oversight, and that it remained without effect.¹ An act of 1817, in relation to the city of Baltimore, provided that the mayor of the city should nominate, and by and with the advice and consent of a convention of the two branches of the city council should appoint, all officers under the corporation. An act of 1828 provided that the mayor and city council might pass ordinances regulating the manner of appointing persons to office under the corporation, which they were then, or might thereafter be, authorized to appoint. It was held that the latter act did not authorize the passage of an ordinance which should take away all participation by the mayor, but simply authorized a change in the manner of appointment. Afterwards the two statutes were combined in one section of a revision, and the later statute was placed earlier in the section. It was held that this circumstance did not change its construction. The court says: "But this circumstance can make no possible difference in the mean-

for the legislative intent in the words of the statute, and also in its occasion and purpose, and in the jurisprudence of the time. When a statute is incorporated in a general revision of all the statutes and re-enacted along with the re-enactment of other statutes, its purpose and effect are not changed unless there be some compelling change in the language. Usually a revision of the statutes simply

reiterates the former declaration of legislative will."

⁹⁸ *Tise v. Shaw*, 68 Md. 1, 11 Atl. 363; *Hooper v. Creager*, 84 Md. 195, 35 Atl. 967, 35 L. R. A. 202; *Aloe v. Fidelity Mut. Life Ass'n*, 164 Mo. 675, 55 S. W. 993.

⁹⁹ *Comer v. State*, 103 Ga. 69, 29 S. E. 501.

¹ *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258.

ing of the acts as codified. Both acts are in the section, and when they were brought together there, their meaning was precisely the same as when they stood separately and apart. . . . To give these two statutes, when codified, a meaning precisely opposite of the one they had before they were codified, merely because the one passed last in order of time happens to be transcribed first in the same section of the code which contains them both, would invoke, or rather invent, a new and a very dangerous rule of interpretation. Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them as best to answer that intention which may be collected from the cause or necessity of making the act, or from foreign circumstances.”²

§ 452. **Repealed and invalid statutes may be considered.**—The revised code of Utah repealed a prior law expressly authorizing cities to impose a license tax on lawyers. This was held to show that the legislature did not intend to include lawyers under a general authority to levy a license tax “on any private corporation or business within the limits of the city.”³ Says the court: “A general rule for the construction of statutes is that when a part of an act has been repealed it must, although of no operative force, still be taken into consideration in construing the rest. The propriety of comparing repealed statutes with those remaining in force, or subsequently enacted, for the purpose of construing the latter, is not to be questioned in the absence of any reference to them in the statute under consideration.” The repeal of section 2 of an act was held not to change the construction of section 1.⁴

An unconstitutional law or part of a law may be considered in order to ascertain the intent of the legislature in

² *Hooper v. Creager*, 84 Md. 195, 248, 35 Atl. 987, 35 L. R. A. 202.

⁴ *Whitcomb v. Standard Oil Co.*, 153 Ind. 513, 55 N. E. 440.

³ *Ogden City v. Boreman*, 20 Utah, 98, 57 Pac. 843.

another law or part of the same law.⁵ Section 96 of an act provided that the supreme court should hear and determine contests of election of judges of the superior court of Cook county. This section was invalid under the constitution. Section 98 of the same act provided that the county court should hear and determine contests of election of all other county, township and precinct officers and all other officers for the contesting of whose election no provision was made. It was held that section 96 showed that the legislature did not intend that the county court should have jurisdiction of contested elections of superior court judges, although no *valid* provision, and, therefore, *no* provision, had been made for contesting their election. "The meaning of the legislature," says the court, "must be gathered from all they have said, as well from that which is ineffective from want of power as from that which is authorized by law."⁶

§ 453 (289). **Interpretation with reference to the common law.**—Statutes are but a small part of our jurisprudence. The principles of the common law pervade and permeate everything which is subject to legal regulation. Such law defines rights and wrongs of every description and the remedies for public and private redress. By its principles statutes are read and construed. They supplement or change it, and it adjusts itself to the modification and operates in conjunction and harmony with them. If words from its vocabulary are employed in them it expounds them. If the statutes are in derogation of it, it yields and bides its time; if they are cumulative, it still continues.⁷ Rules of

⁵ *Sales v. Barber Asphalt Paving Co.*, 166 Mo. 671, 66 S. W. 979; *State v. Taylor*, 21 Wash. 672, 59 Pac. 489.

⁶ *Baird v. Hutchinson*, 179 Ill. 435, 440, 53 N. E. 567.

⁷ *Ryan v. Couch*, 66 Ala. 244; *Lowenberg v. People*, 27 N. Y. 336; *State v. Pierson*, 44 Ark. 265; *Holt v. Agnew*, 67 Ala. 360; *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766,

5 L. R. A. 667; *Bellant v. Brown*, 78 Mich. 294, 44 N. W. 326; *McRoberts v. Lyon*, 79 Mich. 25, 44 N. W. 160. Where a statute providing a penalty for selling or giving away intoxicating liquor was silent as to persons who aid, abet or counsel or procure the selling or giving away such liquor, the principles of the common law in respect to accessio-

interpretation and construction are derived from the common law,⁸ and since that law constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles.⁹ When a statute gives an action it does not abrogate a common-law remedy unless made exclusive.¹⁰ Thus, a statute giving employees an action against their employers for injuries from negligence in certain cases and upon certain conditions does not take away the common-law right of action for the same injuries.¹¹ A statute giving an action for wrongful death to the widow, husband, father, mother, sister or brother of the deceased does not enable a mother to sue for the death of her illegitimate child for the reason that at common law such a child has no father or mother or relatives, and statutes are presumed to be enacted in view of the rules of the common law.¹² The federal judiciary act provides that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in any case that involves the construction or application of the constitution of the United States. It was held that this was to be read in the light of the common law, which did not give the state an appeal or writ of error in criminal cases when the defendant was acquitted, and that conse-

ries before the fact will supplement the statute. *Walton v. State*, 62 Ala. 197. A statutory felony has common-law incidents. *Rex v. Sadi*, 1 Leach, C. C. 468.

⁸ *Rice v. Railroad Co.*, 1 Black, 358, 17 L. Ed. 147; *Charles River Bridge Co. v. Warren Bridge Co.*, 11 Pet. 545, 9 L. Ed. 773, 938.

⁹ *Edwards v. Gaulding*, 38 Miss. 118; *Howe v. Peckham*, 6 How. Pr. 229; *Rice v. Railroad Co.*, 1 Black, 358, 17 L. Ed. 147; *Peterson v. Gittings*, 107 Iowa, 306, 77 N. W. 1056; *Alabama & V. Ry. Co. v. Williams*,

78 Miss. 209, 28 So. 853, 84 Am. St. Rep. 624; *United States v. Sanges*, 144 U. S. 310, 12 S. C. Rep. 609, 36 L. Ed. 445; *Johnson v. Fluetsch*, 176 Mo. 452, 468, 75 S. W. 1005.

¹⁰ *Bellant v. Brown*, 78 Mich. 294, 44 N. W. 326; *McRoberts v. Lyon*, 79 Mich. 25, 44 N. W. 160.

¹¹ *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667.

¹² *Alabama & V. Ry. Co. v. Williams*, 78 Miss. 209, 28 So. 853, 84 Am. St. Rep. 624.

quently the statute did not give the United States an appeal in such cases.¹³

§ 454 (290). *Same*.—It is not presumed that the legislature intended to make any innovation upon the common law further than the necessity of the case required.¹⁴ In other words, statutes in derogation of it, and especially of a common-law right, are strictly construed, and will not be extended by construction beyond their natural meaning.¹⁵ A statute that the mortgagee shall not be entitled to the possession of the mortgaged property until after foreclosure does not affect his right to the appointment of a receiver as before the passage of the act.¹⁶ When by a statute a charge

¹³ *United States v. Sanges*, 144 U. S. 310, 13 S. C. Rep. 609, 36 L. Ed. 445.

¹⁴ *Edwards v. Gaulding*, 38 Miss. 118; *Howe v. Peckham*, 6 How. Pr. 229; *Rice v. Railroad Co.*, 1 Black, 358, 17 L. Ed. 147; *Scaife v. Stovall*, 67 Ala. 237; *Keech v. Baltimore, etc. R. R. Co.*, 17 Md. 32; *Hooper v. Mayor, etc.*, 12 id. 464; *Davis v. Commonwealth*, 17 Gratt. 617; *Wilbur v. Crane*, 13 Pick. 284; *Glover v. Alcott*, 11 Mich. 470; *Heiskell v. Mayor, etc.*, 65 Md. 125, 57 Am. Rep. 308; *Dwar. on St.* 695; 1 Kent's Com. 464 and note.

¹⁵ *Gunter v. Leckey*, 30 Ala. 591; *State v. Whetstone*, 13 La. Ann. 376; *Glover v. Alcott*, 11 Mich. 470; *Sibley v. Smith*, 2 Mich. 486; *Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson*, id. 92, 40 Am. Dec. 259; *Esterley's Appeal*, 54 Pa. St. 192; *Commonwealth v. Knapp*, 9 Pick. 496; *Gibson v. Jenney*, 15 Mass. 205; *Melody v. Reab*, 4 id. 471; *Wilbur v. Crane*, 13 Pick. 284; *Sullivan v. La Crosse, etc. P. Co.*, 10 Minn. 386; *Dwelly v. Dwelly*, 46 Me. 377; *Burnside v. Whitney*, 21 N. Y. 148; *Lock v. Miller*, 3 Stew. & Port. 13; *Young*

McKenzie, 3 Ga. 31; *Bailey v. Bryan*, 3 Jones' L. (N. C.) 357, 67 Am. Dec. 246; *Edwards v. Gaulding*, 38 Miss. 118; *Hollman v. Bennett*, 44 Miss. 322; *Warner v. Fowler*, 8 Md. 25; *Brown v. Barry*, 3 Dall. 365; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 898; *Lord v. Parker*, 6 Allen, 127; *State v. Norton*, 23 N. J. L. 33; *Mullin v. McCreary*, 54 Pa. St. 230; *Howey v. Miller*, 67 N. C. 459; *Hearn v. Ewin*, 3 Cold. 399; *Stewart v. Stringer*, 41 Mo. 400; *Rue v. Alter*, 5 Denio, 119; *Millered v. Railroad Co.*, 9 How. Pr. 238; *Newell v. Wheeler*, 48 N. Y. 486; *Smith v. Moffat*, 1 Barb. 65; *Graham v. Van Wyck*, 14 id. 531; *Perkins v. Perkins*, 62 id. 531; *Bus-sing v. Busbnell*, 6 Hill, 382; *Eilers v. Wood*, 64 Wis. 423, 25 N. W. 440; *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297; *People v. Palmer*, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423; *Fitzgerald v. Quann*, 109 N. Y. 441, 17 N. E. 354; *Bailey v. Gardner*, 31 W. Va. 94.

¹⁶ *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297. The court says: "It is very clear from the language of

is created on property for the satisfaction of a debt, unless the intention is clearly expressed, or is justly and fairly to be implied, it cannot be intended that such charge has a superiority which the common law does not attach to similar charges, nor especially such superiority as the common law has carefully withheld.¹⁷ It will be so construed, if possible, as not to interfere with fundamental rights.¹⁸ The best construction of a statute is to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases.¹⁹ Where a statute directs anything to be done generally and does not appoint any special manner, it is to be done according to the course of the common law.²⁰ A statute provided that misdemeanors might be prosecuted by information. As the statute was silent on the subject, it was held that the requisites of an information were to be ascertained from the common law.²¹

§ 455 (291). In all doubtful matters, and when the statute is in general terms, it is subject to the principles of the common law; it is to receive such a construction as is agreeable to that law in cases of the same nature.²² A statute in affirmance of a rule of the common law will be construed,

this statute, the meaning of which is plain, precise, and impossible to be misunderstood, that it was intended to abrogate the common-law doctrine that a mortgage created an estate upon condition in the mortgagee, which, upon default in the performance of the condition, became absolute, entitling the mortgagee to recover possession. But the language of the act expresses no more than this; and it cannot be fairly construed as abrogating, also, the power of courts of equity to afford mortgagees such remedies for the protection of their equitable rights as, upon equitable grounds, those courts had always been accustomed to afford, and the

granting of which did not rest upon the doctrine of the legal title or right of possession being in the mortgagee." p. 147.

¹⁷ *Scaife v. Stovall*, 67 Ala. 237.

¹⁸ *Bush v. Brainard*, 1 Cow. 78, 13 Am. Dec. 513.

¹⁹ *Bac. Abr., Statutes, I; Stowell v. Zouch*, 1 Plowden, 365; *Miles v. Williams*, 1 P. Wms. 249, 252.

²⁰ *Id.*; *Rex v. Simpson*, 1 Str. 45.

²¹ *Territory v. Cutinola*, 4 N. M. 305, 14 Pac. 809.

²² *Greenwood v. Greenwood*, 28 Md. 370; *Arthur v. Bokenham*, 11 Mod. 150; *Miles v. Williams*, 1 P. Wms. 252; *Wallace v. Taliaferro*, 2 Call, 462; *State v. Sinking Fund Commissioners*, 1 Tenn. Cas. 490.

as to its consequences, in accordance with such law.²³ So provisions which are intended to remedy defects in the common law must be read and construed in the light of that law. When words of definite signification therein are used in such provisions, and there is no intention manifest that they are to be taken in a different sense, they are to be deemed employed in their known and defined common-law meaning.²⁴

§ 456 (292). Extraneous facts in aid of construction.—

Where the meaning of a statute or any statutory provision is not plain, a court is warranted in availing itself of all legitimate aids to ascertain the true intention; and among them are some extraneous facts. The object sought to be accomplished exercises a potent influence in determining the meaning of not only the principal but also the minor provisions of a statute. To ascertain it fully the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment.²⁵ If the statute has been in force for a long period it may be useful to know what was the contemporary construction; its practical construction; the sense of the legal profession in regard to it; the course and usages of business which it will

²³ *Central of Georgia Ry. Co. v. Heron*, 6 Sawyer, 106, Fed. Cas. No. Lippman, 110 Ga. 665, 36 S. E. 202, 7619; *United States v. Jones*, 3 50 L. R. A. 673; *Baker v. Baker*, 13 Wash. 209, Fed. Cas. No. 15,494; Cal. 87. *Lewis v. State*, 3 Head, 127; *Holl-*

²⁴ *Holt v. Agnew*, 67 Ala. 360; *man v. Bennet*, 44 Miss. 323.

²⁵ *Gorham v. Bishop of Exeter*, Moore's Case of, 462; *Hawkins v. Gathercole*, 6 De G. M. & G. 1; *Ton- nele v. Hall*, 4 N. Y. 146; *Clark v. Janesville*, 10 Wis. 136; *Dodge v. Gardiner*, 31 N. Y. 239; *Big Black Creek, etc. Co. v. Commonwealth*, 94 Pa. St. 450; *Keith v. Quinney*, 1 Ora. 364; *Ruggles v. Illinois*, 108 U. S. 526, 2 S. C. Rep. 832, 27 L. Ed. 812.

affect. It may be necessary to apply the meaning of terms of art which it may contain.²⁶ It is apparent, therefore, that the court must bring to its assistance a very considerable amount and variety of extrinsic information, which it is presumed to possess and can resort to at pleasure, as occasion requires, as matters of which it has, in a technical sense, judicial knowledge. Therefore, preliminary to the consideration of some of these collateral aids, it will be pertinent and useful to inquire briefly what facts other than the letter of the law itself are within judicial cognizance.

§ 457 (293). **Judicial knowledge.**—Certain classes of facts are so fixed in their nature and so notorious that courts take notice of them and they are available without proof. They are, first, matters of public law which all are bound to know; second, matters so notorious as to be regarded as universally known; and third, matters peculiarly within the cognizance of the particular court. The courts take notice not only of the existence but the tenor of all public statutes which are laws of the land within their jurisdiction, whether state or national; this knowledge includes their commencement, expiration or repeal,²⁷ and judicial decisions construing them;²⁸ if declared by competent authority unconstitutional, their invalidity is at once to be

²⁶ It was held in *Rex v. Mashita*, 6 Ad. & E. 153, that the word "inhabitants" in a charter has not in itself any definite legal meaning, but must be explained in each case, extrinsically, by evidence of usage, or by reference to the context and objects of the charter. See *Smith v. Lindo*, 4 C. B. (N. S.) 395.

²⁷ *Kessel v. Albetis*, 56 Barb. 362; *Morris v. Davidson*, 49 Ga. 361; *The Scotia*, 14 Wall. 170, 20 L. Ed. 822; *Merrill v. Dawson*, Hempst. 563, Fed. Cas. No. 9469; *Jasper v. Porter*, 2 McLean, 579, Fed. Cas. No. 7229; *Jones v. Hays*, 4 McLean, 521, Fed. Cas. No. 7467; *Terry v.*

Merchants' & Planters' Bank, 66 Ga. 177; *Bird v. Commonwealth*, 21 Gratt. 800; *Mims v. Swartz*, 37 Tex. 13; *Bayly's Adm'r v. Chubb*, 16 Gratt. 284; *Miller v. McQuerry*, 5 McLean, 469, Fed. Cas. No. 9583; *United States v. Turner*, 11 How. 663, 13 L. Ed. 857; *Carpenter v. Dexter*, 8 Wall. 513, 19 L. Ed. 426; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 S. C. Rep. 757, 30 L. Ed. 825.

²⁸ *Hinde v. Vattier*, 5 Pet. 398, 8 L. Ed. 168; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289; *Pennington v. Gibson*, 16 How. 65, 81, 14 L. Ed. 847.

judicially noticed.²⁹ When one state recognizes acts done in pursuance of the laws of another state, as, for example, in certifying the acknowledgment of the execution of a deed, its courts will take judicial cognizance of those laws so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them.³⁰ The federal courts while exercising their original jurisdiction take notice of the statutes of each of the states, and the supreme court, in the exercise of its appellate jurisdiction, does the same.³¹ But the latter court, in the exercise of such jurisdiction on error to the highest court of a state, administers the law in the same view as the state court and can take no broader judicial notice.³²

§ 458 (294). The requirement to take notice of public laws necessarily includes taking notice of all facts and proceedings which concern their validity and interpretation.³³ "If the words of a statute are really and fairly doubtful,"

²⁹ *Cash v. State*, 10 Humph. 111.

³⁰ *Carpenter v. Dexter*, 8 Wall. at p. 531, 19 L. Ed. 426; *Shotwell v. Harrison*, 22 Mich. 410.

³¹ *Course v. Stead*, 4 Dall. 22, 27, note; *Hinde v. Vattier*, 5 Pet. 398, 8 L. Ed. 168; *Owings v. Hull*, 9 Pet. 607, 625, 9 L. Ed. 246; *United States v. Turner*, 11 How. 663, 668, 13 L. Ed. 857; *Pennington v. Gibson*, 16 How. 65, 14 L. Ed. 847; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 230, 15 L. Ed. 896; *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604; *Junction R. R. Co. v. Bank of Ashland*, 12 Wall. 226, 230, 20 L. Ed. 385; *Lamar v. Micou*, 114 U. S. 218, 5 S. C. Rep. 857, 29 L. Ed. 94; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 751, 30 L. Ed. 825; *Hanley v. Donoghue*, 116 U. S. 1, 6, 6 S. C. Rep. 242, 29 L. Ed. 535.

³² *Hanley v. Donoghue*, 116 U. S. 1, 6 S. C. Rep. 242, 29 L. Ed. 535.

In this case the court say that *State of Ohio v. Hinchman*, 27 Pa. St. 479, and *Paine v. Insurance Co.*, 11 R. I. 411, were decided on a misapprehension of the functions of that court. See *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446; *Jarvis v. Robinson*, 21 Wis. 523, 94 Am. Dec. 560; *Hobbs v. Memphis, etc. R. R. Co.*, 9 Heisk. 879; *Baptiste v. De Volunbran*, 5 H. & J. 86, 98; *Bank of U. S. v. Merchants' Bank*, 7 Gill, 415; *Coates v. Mackey*, 56 Md. 416, 419; *Green v. Van Buskirk*, 7 Wall. 139, 18 L. Ed. 599.

³³ *People v. Mahaney*, 13 Mich. 481; *Coburn v. Dodd*, 14 Ind. 347; *Gardner v. The Collector*, 6 Wall. 499, 18 L. Ed. 890; *De Bow v. People*, 1 Denio, 9; *Berliner v. Waterloo*, 14 Wis. 378; *People v. Purdy*, 2 Hill, 31; *Board of Supervisors v. Heenan*, 2 Minn. 330.

said Lord Coleridge, C. J., "then, according to well-known legal principles and principles of common sense, historical investigations may be used for the purpose of clearing away the obscurity which the phraseology of the statute creates."³⁴ Whatever is decisive evidence relative to the due enactment of a statute, whether it be only the certificates of the presiding officers, the statute record, or also the journals of the legislative bodies, the courts which must take notice of the laws, and therefore have necessarily to determine which are valid and duly enacted, may consult.³⁵ A treaty is the supreme law of the land, and as such is within judicial knowledge of the courts;³⁶ they have even knowledge of such foreign laws as the treaties disclose.³⁷

§ 459 (295). The courts have judicial knowledge of all territorial divisions, corporations and institutions established or recognized by public statutes.³⁸ The orphans' court of Washington county, in the District of Columbia, being created by a public statute of the United States, its seal was judicially recognized by the courts of Maryland.³⁹ Courts take notice of the constitution as the fundamental law, and of amendments thereto, and when they take

³⁴ *Regina v. Most*, L. R. 7 Q. B. Div. at p. 251.

³⁵ *People v. Mahaney*, 13 Mich. 481; *Legg v. Mayor*, 42 Md. 203; *Berry v. Baltimore, etc. Co.*, 41 Md. 446, 20 Am. Rep. 69; *People v. De Wolf*, 62 Ill. 253; *Board of Supervisors v. Heenan*, 2 Minn. 330; *People v. River Raisin, etc. R. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64; *People v. Purdy*, 2 Hill, 31; *De Bow v. People*, 1 Denio, 9; *Commercial Bank v. Sparrow*, 2 Denio, 97; *Duncombe v. Prindle*, 12 Iowa, 1; *Green v. Weller*, 32 Miss. 650; *Pangborn v. Young*, 32 N. J. L. 29; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377; *Pacific R. R. Co. v. The Governor*, 23 Mo. 353, 66 Am. Dec.

673; *Opinion of Justices*, 45 N. H. 607; *State v. McLelland*, 18 Neb. 236; *Gardner v. The Collector*, 6 Wall. 499, 18 L. Ed. 890; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Jones v. Hutchinson*, 43 Ala. 721; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446.

³⁶ *Dole v. Wilson*, 16 Minn. 525.

³⁷ *Montgomery v. Deeley*, 3 Wis. 709.

³⁸ *Oxford Poor Rate*, 8 E. & B. 184, 211; *Harding v. Strong*, 42 Ill. 148, 89 Am. Dec. 415; *Sullivan v. People*, 122 Ill. 385, 13 N. E. 248; *State v. Reader*, 60 Iowa, 527, 15 N. W. 423; *Luck v. State*, 96 Ind. 16.

³⁹ *Mangun v. Webster*, 7 Gill, 78.

effect.⁴⁰ They take notice of the common law and the conditions of the country which affected its introduction and adoption; also the law of nations,⁴¹ and the law merchant.⁴² They do not take notice of the written laws of another state or of foreign countries; but the courts of a state take notice of its antecedent laws, whatever their origin; it is so though the state was carved out of an older state or acquired from a foreign power.⁴³

§ 460 (296). Courts take judicial notice of customs which are general and universally known, as of the meaning of C. O. D. affixed to packages sent by common carriers, and the practice and responsibilities relative thereto;⁴⁴ the business of mercantile agencies;⁴⁵ the commercial usage to observe Sundays and holidays.⁴⁶ The custom of the road, as to passing by on the right or left;⁴⁷ general and notorious customs of the sea to be observed by vessels.⁴⁸ Judicial notice is not taken of private statutes,⁴⁹ local customs, by-laws or regulations of corporations, boards and officers.⁵⁰ Mu-

⁴⁰ *Graves v. Keaton*, 3 Cold. 8.

⁴¹ *The Scotia*, 14 Wall. 170, 20 L. Ed. 822. In this case the court say: "Historically, we know that before the close of the year 1864 nearly all the commercial nations of the world had adopted the same [navigation] regulations respecting lights, and that they were recognized as having adopted them."

⁴² *Reed v. Wilson*, 41 N. J. L. 29; *Goldsmith v. Sawyer*, 46 Cal. 209; *Bank of Columbia v. Fitzhugh*, 1 H. & G. 239; *Wiggins F. Co. v. Chicago & A. R. Co.*, 5 Mo. App. 347; *Branch v. Burnley*, 1 Call, 147; *Consequa v. Willings*, 1 Pet. C. C. 225, Fed. Cas. No 3128; *Munn v. Burch*, 25 Ill. 35.

⁴³ *United States v. Turner*, 11 How. 663, 13 L. Ed. 857; *Chouteau v. Pierre*, 9 Mo. 3; *Ott v. Soulard*, id. 581; *Payne v. Treadwell*, 16

Cal. 220; *Pecquet v. Pecquet*, 17 La. Ann. 204; *Bouldin v. Phelps*, 30 Fed. Rep. 547; *Stevens v. Bomar*, 9 Humph. 546; *Henthorn v. Doe*, 1 Blackf. 157; *Green v. Goodall*, 1 Cold. 404; *Wilson v. Smith*, 5 Yerg. 379; *Delano v. Jopling*, 1 Litt. 117.

⁴⁴ *State v. Intoxicating Liquors*, 73 Me. 278. See *contra*, *McNichol v. Pacific Exp. Co.*, 12 Mo. App. 401.

⁴⁵ *Holmes v. Harrington*, 20 Mo. App. 661.

⁴⁶ *Sasscer v. Farmers' Bank*, 4 Md. 409.

⁴⁷ *Turley v. Thomas*, 8 C. & P. 103.

⁴⁸ *The Scotia*, 14 Wall. 170, 20 L. Ed. 822.

⁴⁹ *Workingmen's Bank v. Converse*, 33 La. Ann. 963; *Broad Street Hotel Co. v. Weaver's Administrator*, 57 Ala. 26.

⁵⁰ *Youngs v. Ransom*, 31 Barb. 49;

municipal ordinances are not judicially noticed except by the courts of the municipality, unless otherwise directed by statute.⁵¹

§ 461 (297). **Facts relative to foreign states and nations.**—Courts take notice of the existence of foreign nations, their forms of government as recognized by the executive and legislative departments, their emblems of sovereignty, as flags and seals;⁵² the status of the several states of the Union under the constitution; that they have proper judicial tribunals, legislative and executive departments; their great seals, and the general nature of their jurisprudence.⁵³

Cameron v. Blackman, 39 Mich. 108; *Turner v. Fish*, 28 Miss. 306; *Goldsmith v. Sawyer*, 46 Cal. 209; *Longes v. Kennedy*, 2 Bibb. 607; *Lewis v. McClure*, 8 Ore. 273; *Seymour v. Marvin*, 11 Barb. 80; *Sullivan v. Hense*, 2 Colo. 424; *Johnson v. Robertson*, 3 Md. 476; *Sarahass v. Armstrong*, 16 Kan. 192; *Palmer v. Aldridge*, 16 Barb. 131; *Hensley v. Tarpey*, 7 Cal. 288; *South & N. Ala. R. R. Co. v. Wood*, 74 Ala. 449; *Johnston v. Wilson*, 29 Gratt. 379.

⁵¹ *Garvin v. Wells*, 8 Iowa, 286; *Downing v. Miltonvale*, 36 Kan. 740, 14 Pac. 281; *Case v. Mayor, etc.*, 30 Ala. 538.

⁵² *The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454; *United States v. Palmer*, 3 Wheat. 634, 4 L. Ed. 471; *Lincoln v. Battelle*, 6 Wend. 475; *Griswold v. Pitcairn*, 2 Conn. 85; *City of Berne v. Bank of England*, 9 Ves. 347; *Dolder v. Huntingfield*, 11 id. 283; *Church v. Hubbart*, 2 Cranch, 187, 2 L. Ed. 249.

⁵³ *Whart. on Evi.*, § 314; *Drake v. Glover*, 30 Ala. 382; *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec.

269; *Ripple v. Ripple*, 1 Rawle, 386; *Whitesides v. Poole*, 9 Rich. 68; *Anderson v. Anderson*, 23 Tex. 639; *Hoyt v. McNeil*, 13 Minn. 390; *De Sobry v. De Laistre*, 2 H. & J. 191; *Irving v. McLean*, 4 Blackf. 52; *Monroe v. Douglass*, 5 N. Y. 447; *Whitford v. Panama R. R. Co.*, 23 id. 465; *Carey v. Cincinnati, etc. R. R. Co.*, 5 Iowa, 357; *Commonwealth v. Snowden*, 1 Brewst. 218; *Simms v. Southern Exp. Co.*, 38 Ga. 129; *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Anderson v. Folger*, 11 La. Ann. 269; *Boggs v. Reed*, 5 Mart. 673, 12 Am. Dec. 482; *Newton v. Cocke*, 10 Ark. 169; *Thurston v. Percival*, 1 Pick. 415; *Mason v. Wash*, 1 Ill. 16, 12 Am. Dec. 138; *Wilson v. Cockrill*, 8 Mo. 1; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *Taylor v. Boardman*, 25 Vt. 581; *Miller v. Avery*, 2 Barb. Ch. 582; *Billingsley v. Dean*, 11 Ind. 331; *Champion v. Kille*, 15 N. J. Eq. 476; *Davis v. Bowling*, 19 Mo. 651; *De Celis v. United States*, 13 Ct. Cl. 117; *Williams v. State*, 67 Ga. 260. It has been held in Texas that the courts of that state

§ 462 (298). **Judicial notice of historical and other facts relating to legislation.**—The court will not hear proof of extrinsic facts known to the legislature or members thereof which are supposed to indicate their intention in passing a law.⁵⁴ But circumstances known to all the public, such as what was the law at the time, or what it was supposed to be, are proper to be considered in looking for the intention of the legislature when not explicitly expressed.⁵⁵ The courts take more particular notice of the history of the state in which they sit. “Every judge is bound to know,” says Heydenfeldt, J., “the history and leading traits which enter into the history of the country in which he presides. This we have held before, and it is also an admitted doctrine of the common law. We must therefore know that this state has a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land of the government; that but little of it, as yet, has been acquired by individuals by purchase; that our citizens have gone upon the public land continuously, from a period anterior to the organization of the state government to the present time; upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees; diverted water-courses; and, indeed, have done in the various enterprises of life all that is usual and necessary in a high condition of civilized development. All of these are open and notorious facts, charging with notice of them not only the courts who have to

do not take judicial notice that the common law is in force in other states. *Bradshaw v. Mayfield*, 18 Tex. 21.

⁵⁴ *Delaplane v. Crenshaw*, 15 Gratt. at p. 479.

⁵⁵ *Keyport St. B. Co. v. Farmers' Transportation Co.*, 18 N. J. Eq. at p. 24.

apply the law in reference to them, but also the government of the United States, which claims to be the proprietor of these lands, and the government of the state within whose sovereign jurisdiction they exist.”⁵⁶

The supreme court of the United States took jurisdiction on a writ of error of a suit depending for the amount in controversy on the value of a mining claim apart from fee-simple rights in the suit by patent. In part the court sustains its jurisdiction on judicial knowledge that, “without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country.”⁵⁷

The courts take notice of the population of a state according to the results of the official census;⁵⁸ also of the derivation of land titles.⁵⁹ It was judicially noticed in Arkansas that certain portions of the state were in insurrection and under the control of the United States;⁶⁰ in Tennessee, that the courts in a particular county were closed, civil law suspended, and military law in force during the civil war;⁶¹ in Texas, that the government of the state was administered by military authority, under the reconstruction acts of congress, and that the military commander’s orders had the force of law.⁶² Courts will notice that the Confederate currency was imposed by force, and was at great discount;⁶³ the accession of persons to, and the tenure of office under, the constitution and laws;⁶⁴ the geography and topography

⁵⁶ *Conger v. Weaver*, 6 Cal. 548.

⁶² *Gates v. Johnson Co.*, 36 Tex.

⁵⁷ *Sparrow v. Strong*, 3 Wall. 97, 104, 18 L. Ed. 49.

144.

⁵⁸ *Worcester Bank v. Cheney*, 94 Ill. 430; *People v. Williams*, 64 Cal. 87.

⁶³ *Keppel v. Petersburg R. R. Co.*, Chase’s Dec. 167.

⁵⁹ *Henthorn v. Doe*, 1 Blackf. 157; *Smith v. Stevens*, 82 Ill. 554.

⁶⁴ *State v. Williams*, 5 Wis. 308; *Thompson v. Haskell*, 21 Ill. 215; *Ingram v. State*, 27 Ala. 17; *Ragland v. Wynn*, 37 id. 32; *Alexander v. Burnham*, 18 Wis. 199; *Burnett v. Henderson*, 21 Tex. 588; *Deweese v. Colorado Co.*, 32 Tex. 570.

⁶⁰ *Rice v. Shook*, 27 Ark. 137.

⁶¹ *Killebrew v. Murphy*, 3 Heisk. 546.

of the state, and its history to the extent that these facts and transactions are of public and general interest;⁶⁵ of the boundaries of the state, the extent of territorial jurisdiction, its civil divisions created by law, and notorious surveys, streets, areas and lines.⁶⁶ So the times prescribed by law for holding the terms of the various courts in the state will be judicially noticed.⁶⁷

§ 463 (299). Courts take notice who are their own officers, and of their signatures;⁶⁸ and who are county officers within their jurisdictions.⁶⁹ A court will take judicial notice of its

⁶⁵ *Turner v. Patton*, 49 Ala. 406; *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135; *Payne v. Treadwell*, 16 Cal. 220; *McKinnon v. Bliss*, 21 N. Y. 206; *Ferdinand v. State*, 39 Ala. 706; *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658; *Ashley v. Martin*, 50 Ala. 537; *Taylor v. Graham*, 18 La. Ann. 656; *Andrews v. Knox Co.*, 70 Ill. 65; *New Orleans Canal, etc. Co. v. Templeton*, 20 La. Ann. 141, 96 Am. Dec. 385; *Buford v. Tucker*, 44 Ala. 89; *United States v. 4000 Am. Gold Coin*, 1 Woolw. 217, Fed. Cas. No. 14,439; *Hart v. State*, 55 Ind. 591; *Monroe Co. Com'rs v. May*, 67 Ind. 562; *Hart v. Bodley*, *Hardin*, 98.

⁶⁶ *Goodwin v. Appleton*, 22 Me. 453; *Gilbert v. Moline Water Power Co.*, 19 Iowa, 319; *King v. Kent*, 29 Ala. 542; *Brady v. Page*, 59 Cal. 52; *Carson v. Dalton*, 59 Tex. 500; *People v. Robinson*, 17 Cal. 363; *Central R. R. Co. v. Gamble*, 77 Ga. 584, 3 S. E. 287; *Indianapolis, etc. R. R. Co. v. Case*, 15 Ind. 42; *Indianapolis, etc. R. R. Co. v. Stephens*, 28 id. 429; *Fogg v. Holcomb*, 64 Iowa, 621, 21 N. W. 111; *Board of Commissioners v. Spitler*, 13 Ind. 235; *Brown v. Elms*, 10 Humph. 135; *Gardner v. Eberhart*, 82 Ill. 316; *Kile v. Yellowhead*,

80 id. 208; *Ham v. Ham*, 39 Me. 263; *Buckinghouse v. Gregg*, 19 Ind. 401; *Atwater v. Schenck*, 9 Wis. 160; *Prieger v. Exchange, etc. Ins. Co.*, 6 id. 89; *United States v. Johnson*, 2 Sawyer, 482, Fed. Cas. No. 15,488; *Hill v. Bacon*, 43 Ill. 477; *State v. Ray*, 97 N. C. 510, 1 S. E. 876; *Wright v. Hawkins*, 28 Tex. 452; *Wright v. Phillips*, 2 Greene (Iowa), 191; *Ross v. Austill*, 2 Cal. 183; *State v. Tootle*, 2 Harr. 541; *La Grange v. Chapman*, 11 Mich. 499; *Solyer v. Romanet*, 52 Tex. 562; *Martin v. Martin*, 51 Me. 366; *Stoddard v. Sloan*, 65 Iowa, 680, 22 N. W. 924; *Vanderwerker v. People*, 5 Wend. 530.

⁶⁷ *Lindsay v. Williams*, 17 Ala. 229; *Morgan v. State*, 12 Ind. 448; *Pugh v. State*, 2 Head, 227; *State v. Hammett*, 7 Ark. 492; *Gilliland v. Sellers*, 2 Ohio St. 223. See *McGinnis v. State*, 24 Ind. 500.

⁶⁸ *Yell v. Lane*, 41 Ark. 53; *Dyer v. Last*, 51 Ill. 179; *Hanmann v. Mink*, 99 Ind. 279; *Buell v. State*, 72 Ind. 523; *People v. Lyman*, 2 Utah, 38.

⁶⁹ *Wetherbee v. Dunn*, 35 Cal. 106; *Templeton v. Morgan*, 16 La. Ann. 438.

own record of proceedings in a particular case before it. Thus, on error in an appellate court to recover a second judgment in a cause in which a former judgment had been reversed, it being assigned for error that it did not appear by the record that at the time of the second trial the cause had been remitted, the court overruled the point by its judicial knowledge of the *remittitur*.⁷⁰ But a court will not take notice, in deciding one case, of what may be contained in the record of another and distinct case, unless proved.⁷¹ The record in garnishment is so far a part of the record in the cause that it will be judicially noticed therein.⁷²

§ 464 (301). **Judicial knowledge of facts in general.**—What is matter of general knowledge, universally accepted and acted upon, courts will *ex officio* recognize as true. They will avail themselves of it in the exposition of statutes, deliver such facts, when pertinent, to juries, and will not permit them to question their verity. Such facts cannot be precisely defined; their recognition depends on their certainty and notoriety, and the courts, proceeding with their usual care and conservatism, will resolve doubts by rejecting any supposed facts in a particular case.⁷³ Under such restrictions they judicially recognize whatever has the requisite certainty and notoriety in every field of knowledge, in every walk of practical life. "There are a vast variety of things," said Graves, C. J.,⁷⁴ "which must be regarded as matters of common knowledge; things which every adult person of ordinary experience and intelligence must be presumed to know; things which do not require to be pleaded or to be made the subject of specific proof; and it is not

⁷⁰ *Brucker v. State*, 19 Wis. 539, citing *The Santa Maria*, 10 Wheat. 442, 6 L. Ed. 359; *Cash v. State*, 10 Humph. 115. See also *State v. Bowen*, 16 Kan. 475; *National Bank v. Bryant*, 13 Bush, 419.

⁷¹ *National Bank v. Bryant*, *supra*.

⁷² *Farrar v. Bates*, 55 Tex. 193.

⁷³ *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200.

⁷⁴ *Gilbert v. Flint, etc. R. R. Co.*, 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592.

within the province of a court to leave it to a jury to find contrary to this knowledge." It was accordingly held that the question was for the court whether a railroad company was guilty of negligence in leaving a box freight car standing still at a highway crossing as tending to frighten horses of ordinary gentleness.⁷⁵

In *Board of Health v. Hill*,⁷⁶ Erle, C. J., said: "Every one knows what the trade of a brickmaker is." And the court acted upon general knowledge in determining the character of that trade as to its being a nuisance. In *Holman's Appeal*⁷⁷ the court took judicial notice of the long practical construction of a statute, and of the general understanding of the profession as to its scope and meaning.⁷⁸ It was judicially known that the tide ebbs and flows to a great height in the River Mersey in England.⁷⁹ In *Jarvis v. Robinson*,⁸⁰ Dixon, C. J., said: "We all know that the circuit courts of the several states are courts of general jurisdiction, as well as we know that courts of justices of the peace are not; and why should judges assume a degree of ignorance on the bench which would be unpardonable in them when off of it." Superior courts know when it has been the immemorial practice of an inferior court of record

⁷⁵Id. In Mr. Metcalfe's very instructive article found in 28 Am. L. Reg. 193, he says at p. 456: "There remains a vast array of facts which can become generally known only through the uniform results of experience in life. From the immense multiplicity of these matters, they may never receive, in the usual form, historical or scientific indorsement. They lie in the region of traditional or actual knowledge, common to civilization, and may be known as a 'knowledge of men and things.' The rule of their judicial reception is, that 'courts will not pretend to

be more ignorant than the rest of mankind.' Such matters can never be given in evidence by means of any spoken or written language, and hence they can leave no impression upon the record of a cause."

⁷⁶ 13 C. B. (N. S.) at p. 483.

⁷⁷ 106 Pa. St. 502.

⁷⁸*Keyport St. Co. v. Transportation Co.*, 18 N. J. Eq. 13; *Scruggs v. Brackin*, 4 Yerg. 528; *Egnew v. Cochrane*, 2 Head, 320.

⁷⁹*Whitney v. Gauche*, 11 La. Ann. 432.

⁸⁰ 21 Wis. at p. 526, 94 Am. Dec. 560.

consisting of several members to recognize one practically as a quorum. Thus an act provided that it should be lawful for the judges of the central criminal court, "or any two or more of them, to inquire of, hear, determine and adjudge the offenses specified." It was ruled that one could hold the court. "From the earliest period," said Cockburn, C. J., "commissions of oyer and terminer have been framed in the same terms as are employed in the statute in question. In these commissions a certain specified number of the persons, some of whom are named, are always constituted a quorum. Yet for centuries the trials of offenses under such commissions upon the circuits of the judges have been held before a single judge, and the proceedings are nevertheless represented on the record as taking place not before one judge, but before the other judges sitting under the commission."⁸¹

§ 465 (302). A court will take judicial notice of the seasons and of the general course of agriculture, so as to know whether at a particular date the crops of the country would be matured so as to be severed.⁸² An agreement required a cropper to deliver to his landlord the "small grain in the half bushel as soon as threshed;" and it was argued that, as there was no time specified when it should be threshed, the law would hold that it should be threshed and delivered within a reasonable time; that the court will judicially take notice of the time when such crops matured, on the principle that whatever ought to be generally known within the limits of its jurisdiction, of that the court will judicially take notice. The court answered: We do not think the doctrine of judicial notice has been carried quite to "this extent." The time when wheat, oats and barley matured was stated by the court to vary in different parts of the state, and even in the same locality. "Of facts of unvarying occurrence," say the court, "courts must take judicial

⁸¹ *Leverson v. Reg.*, L. R. 4 Q. B. Am. Dec. 374; *Tomlinson v. Greenfield*, 31 Ark. 557; *Case v. Serew*, 46 394.

⁸² *Floyd v. Ricks*, 14 Ark. 286, 58 Hun, 57.

notice, but not of the vicissitudes of climate or the seasons.”⁸³ The court will take notice of the course of the seasons and of husbandry, and that the use of a farm for six months during the cropping season would be worth much more per acre than it would be during the six months including the winter season.⁸⁴ A court will take notice from the time of a father’s death whether at a particular date his children had arrived at majority.⁸⁵ It is on the same principle that mortuary tables are acted upon as embodying the results of general observation.⁸⁶ Courts will take judicial notice of the calendar and on what day of the week a given day of the month falls;⁸⁷ the time when the sun rises at given times.⁸⁸

§ 466 (303). The fact that “brandy is ranked as an intoxicating liquor by writers upon the general subject, and that it is a liquor of that character is generally and commonly known, is one of which the courts will take judicial knowledge.”⁸⁹ Everybody knows what gin is; knows not only that it is a liquor, but also that it is intoxicating.⁹⁰ The same is held in regard to whisky.⁹¹ So a court will take judicial notice that “lager beer,” commonly used as a beverage, is a malt and an intoxicating liquor.⁹² That coal oil is inflammable.⁹³ Courts judicially know of the navigability of such streams as the Mississippi river; they know this because they form part of the geography of the country, and their navigability is known as forming part of the

⁸³ *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312. See *Moulton v. Posten*, 52 Wis. 169, 173, 8 N. W. 621.

⁸⁴ *Ross v. Boswell*, 60 Ind. 235.

⁸⁵ *Floyd v. Johnson*, 2 Litt. 109.

⁸⁶ *Goodon v. Tweedy*, 74 Ala. 232.

⁸⁷ *Allman v. Owens*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 id. 674; *Philadelphia, etc. R. R. Co. v. Lehman*, 56 Md. 209; *McIntosh v. Lee*, 57 Iowa, 356; *Curtis v. March*, 4 Jur. (N. S.) 1112.

⁸⁸ *People v. Chee Kee*, 61 Cal. 404.

⁸⁹ *Fenton v. State*, 100 Ind. 598.

⁹⁰ *Commonwealth v. Peckham*, 2 Gray, 514.

⁹¹ *Carmon v. State*, 18 Ind. 450; *Eagan v. State*, 53 Ind. 162; *Schlicht v. State*, 56 id. 173.

⁹² *Watson v. State*, 55 Ala. 158; *State v. Goyette*, 11 R. I. 592; *Briffitt v. State*, 58 Wis. 39, 46 Am. Rep. 621; *Kerkow v. Bauer*, 15 Neb. 150; *Killip v. McKay*, 13 N. Y. St. Rep. 5.

⁹³ *State v. Hayes*, 78 Mo. 307.

common public history;⁹⁴ they know that a "gift enterprise" in common parlance is understood to be substantially a scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in it.⁹⁵

§ 467 (304). Courts will take notice of whatever is generally known within the limits of their jurisdiction. A patent was held void on its face for want of novelty.⁹⁶ To require proof of every fact, as that Calais is beyond the jurisdiction of the courts of England, would be utterly and absolutely absurd.⁹⁷ In a libel case in which the libel was that the friends of the plaintiff had "realized the fable of the frozen snake," the court took judicial notice that the knowledge of that fable existed generally in society.⁹⁸ Conventional expressions conveying a particular idea may become so current that a court would take judicial notice of their popular meaning. In an action by a clergyman for libel, the court took judicial notice of the meaning of the words: "Then there was that Iowa Beecher business which beat him out of a station at Grass Lake."⁹⁹

§ 468 (305). The courts will judicially notice the art of photography, the mechanical and chemical processes employed, the scientific principles on which they are based, and their results.¹ But it has been held that courts will not take judicial notice of philosophic or scientific facts and principles which are not generally known.² Facts stated even in standard publications, such as encyclopedias and dictionaries, will not be judicially noticed unless they are of such universal notoriety as to be a part of the common

⁹⁴ Neaderhouser v. State, 28 Ind. 257; Siegbert v. Stiles, 39 Wis. 533.

⁹⁵ Lohman v. State, 81 Ind. 15.

⁹⁶ Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200.

⁹⁷ Gres. Eq. Ev. 294.

⁹⁸ Hoare v. Silverlock, 12 Q. B. 624.

⁹⁹ Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

¹ Luke v. Calhoun Co., 52 Ala. 115.

² Ausman v. Veal, 10 Ind. 355; St. Louis G. L. Co. v. American F. Ins. Co., 33 Mo. App. 348. See Spensley v. Lancashire Ins. Co., 54 Wis. 433, 11 N. W. 894.

knowledge of all persons.³ Courts cannot take notice of minor geographical and other like facts, unless historically or traditionally well and generally known.⁴

§ 469 (306). Courts will take judicial notice that the business of a barber on Sunday is not a work of necessity;⁵ the peculiar nature of lotteries and how they are generally managed;⁶ what a billiard table is.⁷ They will take notice of the character of the circulating medium, and the meaning of popular language relating to it;⁸ the different classes

³ *Kaolatype Engraving Co. v. Hoke*, 30 Fed. Rep. 444.

⁴ *Buffalo, etc. Co. v. N. Y. etc. R. Co.*, 10 Abb. N. C. 107. *Chan. Bland in Patterson v. McCausland*, 3 Bland's Ch. at p. 71, said: "The law respects the regular course of nature in every way; and, consequently, in all cases in so far as the course of nature is known, all such facts, as well in regard to the revolution of the seasons, as to animals and vegetables; as to the mating of birds, and their co-operation in rearing their young, the blooming time of roses, and the like, are received as being in themselves entirely trustworthy, or as facts from which inferences as to the truth of other facts may be safely drawn. *Co. Litt.* 40, 92, 197; 1 *Stark. Ev.* 472, note; *Case of Swans*, 7 *Co.* 82. In questions of bastardy, the time of access being proved, the known term of gestation, reckoning from the time of birth, is always received as a most satisfactory kind of presumptive evidence. *Co. Litt.* 123b, note; *Rex v. Luffe*, 8 *East*, 193. So, too, in all the various questions in relation to the right of property connected with the continuance of life, facts so far as they are known,

in regard to the probability, the expectation, and the average duration of human life, have always been in like manner admitted as evidence, or as a ground from which presumptive evidence of the existence of other facts may be fairly deduced. And there can be no doubt that the regular and known course of nature in the formation of vegetables may be as safely relied on as direct, or as presumptive evidence, as in that of animals. The only point of difficulty as to both being the establishment of the truth of that which is alleged to be the uniform and regular course of nature." But it was held that, in the absence of evidence that the number of concentric layers in the trunk of a tree correspond with the years of its age, the hypothesis that the formation of each one of such concentric layers is evidence of the lapse of a year cannot be judicially received.

⁵ *State v. Frederick*, 45 *Ark.* 347.

⁶ *Salomon v. State*, 28 *Ala.* 83.

⁷ *State v. Price*, 12 *G. & J.* 260, 37 *Am. Dec.* 81.

⁸ *Lampton v. Haggard*, 3 *T. B. Mon.* 149.

of notes and bills in circulation as money at a particular time;⁹ the general facts connected with the emission, use and circulation of the Confederate currency;¹⁰ the changes in the course of business in the country and of new processes to facilitate trade¹¹ and communication;¹² that a railroad superintendent has authority to receive or refuse cordwood;¹³ the customary price of ordinary labor;¹⁴ the meaning of common and generally known abbreviations of proper names and of other things;¹⁵ that Free Masonry is a charitable institution;¹⁶ of the usual duration of a voyage across the Atlantic;¹⁷ the ordinary incidents of railway travel;¹⁸ that the language of all countries is subject to fluctuation;¹⁹ the distance between well-known cities of the United States and the speed of railway travel between them.²⁰ There is considerable diversity of opinion in dealing with the multifarious facts for which judicial notice has been claimed, but these contrarieties have arisen in the application of conceded principles, and when compared will be found to merely illustrate different degrees of caution and conservatism.²¹

§ 470. **Proceedings in the legislature—Amendments, debates, committee reports, etc.**—The proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing the act. Thus the

⁹ *Hart v. State*, 55 Ind. 599.

¹⁷ *Openheim v. Wolf*, 3 Sandf.

¹⁰ *Simmons v. Trumbo*, 9 W. Va. 358.

Ch. 571.

¹¹ *Wiggins Ferry Co. v. Chicago, etc. R. R. Co.*, 5 Mo. App. 347.

¹⁸ *Downey v. Hendrie*, 46 Mich. 498, 9 N. W. 828.

¹² *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828.

¹⁹ *Vanada v. Hopkins*, 1 J. J. Marsh. 285, 19 Am. Dec. 92.

¹³ *Sacalaris v. Eureka, etc. R. R. Co.*, 18 Nev. 155, 51 Am. Rep. 737.

²⁰ *Pearce v. Langfit*, 101 Pa. St. 507, 47 Am. Rep. 737; *Rice v. Montgomery*, 4 Biss. 75.

¹⁴ *Bell v. Barnet*, 2 J. J. Marsh. 516.

²¹ *Goodwin v. Appleton*, 22 Me. 453; *Penn. Co. v. Frana*, 13 Ill. App.

¹⁵ *Moseley v. Mastin*, 37 Ala. 216; *Stephen v. State*, 11 Ga. 225; *Weaver v. McElhenon*, 13 Mo. 89.

91; *Johnson v. Common Council*, 16 Ind. 227; *Buckinghouse v. Gregg*,

¹⁶ *Burdine v. Grand Lodge*, 37 Ala. 478.

19 id. 401; *Porter v. Waring*, 69 N. Y. 250; *Allen v. Scharinghausen*, 8 Mo. App. 229; *Rice v. Montgom-*

reports of committees made to the legislature have been held to be proper sources of information in ascertaining the intent or meaning of the act.²² Amendments made, or proposed and defeated, may also throw light on the construction of the act as finally passed, and may properly be taken into consideration.²³ Where a license act was amended, while pending in the legislature, by striking out *saw mills*, such fact was held to clearly show that they were not intended to be included in the general language of the act.²⁴ In one case the supreme court of the United States com-

ery, 4 Biss. 75, Fed. Cas. No. 11,753; State v. Russell, 17 Mo. App. 16; Wilcox v. Jackson, 109 Ill. 261; Bishop v. Jones, 28 Tex. 294; Bradford v. Floyd, 80 Mo. 207; State v. Wise, 7 Ind. 645; Ward v. Henry, 19 Wis. 76, 88 Am. Dec. 672; State v. Bruner, 17 Mo. App. 274; Stanberry v. Nelson, Wright (Ohio), 766; Mosley v. Vt. Mut. F. Ins. Co., 55 Vt. 142; Ellis v. Park, 8 Tex. 205; Russell v. Martin, 15 id. 238; Seymour v. Marvin, 11 Barb. 80; Modawell v. Holmes, 40 Ala. 391; Cicero, etc. Co. v. Craighead, 28 Ind. 274; Riggins v. Collier, 6 Mo. 568; Whitlock v. Castro, 22 Tex. 108; Woodward v. Chicago, etc. R. R. Co., 21 Wis. 309; Longes v. Kennedy, 2 Bibb, 607; McDonald v. Kirby, 3 Heisk. 607; Cutter v. Caruthers, 48 Cal. 178; State v. Cleveland, 80 Mo. 108; Market Bank v. Pacific Bank, 27 Hun, 465; Johnson v. Robertson, 31 Md. 476; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Kelley v. Story, 6 Heisk. 202; Temple v. State, 15 Tex. App. 304; Bennett v. North British Ins. Co., 8 Daly, 471; Feemster v. Ringo, 5 T. B. Mon. 336; South & N. A. R. R. Co. v. Wood, 74 Ala. 449; Esterbrook Mfg. Co. v.

Ahern, 30 N. J. Eq. 341; Shropshire v. State, 12 Ark. 190; Southwestern Mo. Light Co. v. Scheurich, 174 Mo. 235, 73 S. W. 496; State v. Snow, 117 N. C. 774, 23 S. E. 322; Lawder v. Stone, 187 U. S. 281, 23 S. C. Rep. 79.

²² Houston & Tex. Cent. Ry. Co. v. State, 95 Tex. 507, 62 S. W. 114; Wisconsin Industrial School v. Clark County, 103 Wis. 651, 79 N. W. 422; Dane County v. Reindahl, 104 Wis. 302, 80 N. W. 438; Church of the Holy Trinity v. United States, 143 U. S. 457, 12 S. C. Rep. 511, 36 L. Ed. 226; Buttfield v. Stranahan, 192 U. S. 470.

²³ State v. Lancashire Fire Ins. Co., 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348; Barnard v. Gall, 43 La. Ann. 959, 10 So. 5; State v. Hostetter, 137 Mo. 636, 39 S. W. 270; Baker v. Payne, 22 Ore. 335, 29 Pac. 787; Small v. Small, 129 Pa. St. 366, 18 Atl. 497; Buttfield v. Stranahan, 192 U. S. 470. See Standard Underground Cable Co. v. Attorney-General, 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394.

²⁴ Barnard v. Gall, 43 La. Ann. 959, 10 So. 5.

ments on a petition to congress asking for legislation on the subject of the act construed, and evidently considered it of some weight in determining the meaning of the act.²⁵ It has been held in the English courts that when a statute is supposed to have been founded on the report of commissioners appointed by the crown, the report ought not to be referred to in a court of justice as a guide in construing the statute.²⁶ But if the reasons and objects of the law are made known by any other document equally authentic and certain, as the report of one of the heads of departments, it may be referred to to aid in the interpretation of doubtful or ambiguous language in the law.²⁷ It was held in *State v. Cloksey*,²⁸ that, in the interpretation of words used in the constitution, the court may derive such aid as may be afforded by looking at the journals of the convention which framed that instrument, to ascertain in what sense such words were used by the convention;²⁹ or journals of the legislature in respect to the history of the enactment.³⁰ It is held in Indiana that the journals containing the proceedings in reference to a bill enacted into a statute may be looked to by the courts to ascertain the intention of the

²⁵ *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 S. C. Rep. 511, 36 L. Ed. 226.

²⁶ *Steele v. Midland R. Co., L. R.* 1 Ch. 282; *Martin v. Hemming*, 18 Jur. 1002; 24 L. J. Ex. 5; *Salkeld v. Johnson*, 2 C. B. 756; *Farley v. Bonham*, 2 J. & H. 177; *Matter of Dean of York*, 2 Q. B. 34; *Ewart v. Williams*, 3 Drew. 21, 24; *Bank of Pa. v. Commonwealth*, 19 Pa. St. 144, 156; *Arding v. Bonner*, 2 Jur. (N. S.) 763; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446, 450. See *Fellowes v. Clay*, 4 Q. B. 356; *Edger v. County Commissioners*, 70 Ind. 331; *Blake v. National Banks*, 23 Wall. 307, 321, 23 L. Ed. 119.

²⁷ *United States v. Webster, Davies*, 38, Fed. Cas. No. 16,658; *Perkins v. Sewell*, 1 W. Black. 659; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Clare v. State*, 5 Iowa, 509; *Division of Howard Co.*, 15 Kan. 194.

²⁸ 5 Sneed, 482.

²⁹ *State v. Douglass*, 5 Sneed, 608. See *Wis. Cent. R. R. Co. v. Taylor Co.*, 52 Wis. 37, 8 N. W. 833.

³⁰ *Hill's Adm'r v. Mitchell*, 5 Ark. 608; *People v. Lyman*, 2 Utah, 30. See *Bank of Penn. v. Commonwealth*, 19 Pa. St. 144; *Southwark Bank v. Commonwealth*, 26 id. 446.

legislature in enacting it if it be ambiguous.³¹ In *Blake v. National Banks*,³² the journals of congress were referred to, and the court said they were compelled to ascertain the legislative intention in that way.³³ In Illinois they may be put in evidence, and when offered they prove themselves, and may be consulted to determine whether an act was duly passed.³⁴ So in Alabama.³⁵ In Kentucky, journals may be proved on an issue by pleading to show that a bill was not duly passed.³⁶ There has been occasionally judicial reference to declarations of members of legislative bodies, but such aids are but slightly relied upon, and the general current of authority is opposed to any resort to such aids.³⁷ It is not at all certain that those members who speak upon a bill are the most influential, or that they express the views of those who do not speak.³⁸ In commenting on this question the supreme court of the United States says: "There

³¹ *Edger v. Board of Commissioners*, 70 Ind. 331; *Wood Mowing, etc. Co. v. Caldwell*, 54 Ind. 276, 279; *Division of Howard Co.*, 15 Kan. 194. See *Coleman v. Dobbins*, 8 Ind. 156.

³² 23 Wall. 307, 23 L. Ed. 119.

³³ See *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Hebbert v. Purchas*, L. R. 3 P. C. 648.

³⁴ *Grob v. Cushman*, 45 Ill. 119.

³⁵ *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28.

³⁶ *Auditor v. Haycraft*, 14 Bush, 284.

³⁷ *Re Mew*, 31 L. J. Bankruptcy, 89; *Reg. v. Hertford College*, L. R. 3 Q. B. Div. 707; *Attorney-General v. Sillem*, 2 H. & C. 521; *Cumberland County v. Boyd*, 113 Pa. St. 52, 57, 4 Atl. 346; *District of Columbia v. Washington Market*, 108 U. S. 243, 2 S. C. Rep. 543, 27 L. Ed. 714; *United States v. Union Pac. R. R. Co.*, 91 U. S. 72; *Aldridge v. Will-*

iams, 3 How. 9, 11 L. Ed. 469; *Taylor v. Taylor*, 10 Minn. 107; *Leese v. Clark*, 20 Cal. 387; *Keyport, etc. Co. v. Trans. Co.*, 18 N. J. Eq. 13. Judges who have been members of the legislature have sometimes mentioned their knowledge of declarations while acting in that capacity. *Moyer v. Gross*, 2 P. & W. 171; *Re Mew, supra*; *Mounsey v. Ismay*, 34 L. J. Ex. 56; 3 H. & C. 486; *Hedworth v. Primate*, Hard. 318; *McMaster v. Lomax*, 2 Myl. & K. 32; *Hudson v. Tooth*, L. R. 3 Q. B. Div. 46; *Drummond v. Drummond*, L. R. 2 Ch. 45; *State v. Nichols*, 30 La. Ann., Pt. II, 980. Statements made in memorials to the legislature concerning the meaning of statutes will not control the court in construing them. *Ross v. Supervisors*, 12 Wis. 26.

³⁸ *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466, 472, 51 S. W. 633, 45 L. R. A. 348.

is, too, a general acquiescence in the doctrine that the debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.”³⁹

The testimony or opinions of individual members of the legislature are not admissible for the purpose of showing what was intended or meant by an act.⁴⁰

§ 471 (300): Surrounding facts and conditions—Mischief to be remedied.—In order to ascertain the purpose or intention, if it is not clearly expressed in a statute, or that such purpose or intention may be carried into effect, the court will take notice of the history of its terms when it was enacted.⁴¹ It is needful in the construction of all

³⁹ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318, 17 S. C. Rep. 540, 41 L. Ed. 1007. To same effect, *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 12 S. C. Rep. 55, 35 L. Ed. 821; *District of Columbia v. Reuter*, 15 App. Cas. (D. C.) 237; *United States v. Oregon & Cal. R. R. Co.*, 57 Fed. 426; *Carter v. Hobbs*, 92 Fed. 594.

⁴⁰ *State v. Bank*, 88 Iowa, 661, 664, 56 N. W. 180; *Garland County v. Hot Spring Co.*, 68 Ark. 83, 56 S. W. 636; *Stewart v. Atlanta Beef Co.*, 93 Ga. 12, 18 S. E. 981, 44 Am. St. Rep. 119; *Richmond v. Supervisors*, 88 Va. 204, 2 S. E. 26; *People*

v. Smith, 78 Hun, 179, 28 N. Y. 912. In *Richmond v. Supervisors*, the court says: “The intention of the draughtsman of the act, or of the individual members of the legislature who voted for and passed it, if not properly expressed in the act, it is admitted has nothing to do with its construction. The only just rule of construction, especially among a free people, is the meaning of the law as expressed to those to whom it is prescribed, and who are to be governed by it.” p. 213.

⁴¹ *Aldridge v. Williams*, 3 How. 9, 11 L. Ed. 469; *United States v. Union P. R. R. Co.*, 91 U. S. 72, 23 L. Ed. 224; *State v. Nichols*, 30 La.

instruments to read them in view of the surrounding facts. To understand their purport and intended application, one should, as far as possible, be placed in a situation to see the subject from the maker's standpoint and study his language with that outlook. Statutes are no exception.⁴² The court may look to the surrounding circumstances.⁴³ It accords with Lord Coke's rule,⁴⁴ and a rational sense of what is suitable, to ascertain what were the circumstances with reference to which the words of the statute were used, and what was the object appearing from those circumstances which the legislature had in view.⁴⁵ When occasion arises for resort to such extrinsic facts a court may obtain information from any authentic source. As was said by Mr. Justice Miller in *Gardner v. The Collector*,⁴⁶ "from any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer," "always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." It is proper to consider the origin and history of the law,⁴⁷ the

Ann. (Pt. II) 980; *Sheriff v. Caddo Parish*, 37 id. 788; *De Celis v. United States*, 13 Ct. Cl. 117; *Williams v. State*, 67 Ga. 260.

⁴² *Tonnele v. Hall*, 4 N. Y. 140; *McIntyre v. Ingraham*, 35 Miss. 25; *Sheriff v. Parish of Caddo*, 37 La. Ann. 788; *State v. Judge*, 12 id. 777; *Big Black Creek, etc. Co. v. Commonwealth*, 94 Pa. St. 450; *Ruggles v. Illinois*, 108 U. S. 526, 2 S. C. Rep. 832, 27 L. Ed. 812; *Crawfordsville, etc. Co. v. Fletcher*, 104 Ind. 97, 2 N. E. 243.

⁴³ *State v. Field*, 112 Mo. 554, 20 S. W. 672; *Northwestern Telephone Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69; *Matter of Livingston*, 121 N. Y. 94, 24 N. E. 290; *Taff Vale Ry. Co. v. Davis*, (1894) 1 Q. B. 43; *Southwest-*

ern Mo. Light Co. v. Scheurich, 174 Mo. 235, 73 S. W. 496.

⁴⁴ *Heydon's Case*, 3 Rep. 7a; *Case of the Marshalsea*, 10 id. 73a.

⁴⁵ *River Wear Com'rs v. Adamson*, L. R. 1 Q. B. D. 546; 2 App. Cas. 764; *Delaplane v. Crenshaw*, 15 Gratt. 457; *Smith v. Speed*, 50 Ala. 276; *Fairchild v. Gwynne*, 16 Abb. Pr. 23; *Gorham v. Bishop of Exeter*, *Moore's Case of*, 462; *Attorney-General v. Sillem*, 2 H. & C. 531; *Reg. v. Zulueta*, 1 C. & K. 215.

⁴⁶ 6 Wall. at p. 511, 18 L. Ed. 890.

⁴⁷ *Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521; *Loper v. State*, 82 Minn. 71, 84 N. W. 650; *Springfield Grocer Co. v. Walton*, 95 Mo. App. 526, 69 S. W. 477; *Matter of Gihon*, 48 App. Div. 598, 62 N. Y. S. 598; *United States v. Burr*, 159 U. S. 78, 15 S. C.

prior condition of the law,⁴⁸ and the general policy and course of legislation.⁴⁹ "There are few guides to construction more useful than that which directs attention to the prior condition of the law to aid in determining the full legislative meaning of any statutory change thereof."⁵⁰ The legislative department is supposed to have a consistent design and policy and to intend nothing inconsistent or incongruous.⁵¹ The mischief intended to be removed or suppressed or the cause or necessity of any kind which induced the enactment of a law are important factors to be considered in its construction.⁵² "The purpose for which the law

Rep. 1002, 40 L. Ed. 82; Knowlton v. Moore, 178 U. S. 41, 20 S. C. Rep. 747, 44 L. Ed. 969.

⁴⁸ Soby v. People, 134 Ill. 66, 25 N. E. 109; Reighart v. Harris, 6 Kan. App. 339, 51 Pac. 788; Swan v. Mulherin, 67 Ill. App. 77; Lémonius v. Mayer, 71 Miss. 514, 14 So. 33; Dowdy v. Wamble, 110 Mo. 280, 19 S. W. 489; Greeley v. Missouri Pac. Ry. Co., 123 Mo. 157, 27 S. W. 613; Duff v. Karr, 91 Mo. App. 16; State v. Baushausen, 49 Neb. 558, 68 N. W. 950; State v. Ross, 20 Nev. 61, 14 Pac. 827.

⁴⁹ Fuellhart v. Blood, 21 Pa. Co. Ct. 601; Cummings v. Everett, 82 Me. 260, 19 Atl. 456; Crary v. Port Arthur Channel & Dock Co., 92 Tex. 275, 47 S. W. 967.

⁵⁰ Dowdy v. Wamble, 110 Mo. 280, 283, 19 S. W. 489.

⁵¹ Cummings v. Everett, 82 Me. 260, 265, 19 Atl. 456.

⁵² Toomy v. Dunphy, 86 Cal. 639, 25 Pac. 130; Larimer Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111; Soby v. People, 134 Ill. 66, 25 N. E. 109; Hogan v. Akin, 181 Ill. 448, 55 N. E. 137; People v. Harrison, 191 Ill. 257, 61 N. E. 99;

Bowles v. Keator, 47 Ill. App. 98; Swan v. Mulherin, 67 Ill. App. 77; Board of Commissioners, 128 Ind. 295, 27 N. E. 133; State v. Roby, 142 Ind. 168, 41 N. E. 145, 51 Am. St. Rep. 174, 33 L. R. A. 213; Reighart v. Harris, 6 Kan. App. 339, 51 Pac. 788; Roland Park Co. v. State, 80 Md. 448, 31 Atl. 298; Commercial B. & L. Ass'n v. Mackenzie, 85 Md. 132, 36 Atl. 754; Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626; Fitzgerald v. Rees, 67 Miss. 473, 7 So. 341; Lémonius v. Mayer, 71 Miss. 514, 14 So. 33; Green v. Houston, 45 Nev. 813, 64 N. W. 245; State v. Ross, 20 Nev. 61, 14 Pac. 827; Tonele v. Hall, 4 N. Y. 146; Dodge v. Gardiner, 31 N. Y. 239; People v. Campbell, 80 Hun, 95, 30 N. Y. S. 70; Keith v. Quinney, 1 Ore. 364; Black Creek, etc. Co. v. Commonwealth, 94 Pa. St. 450; Ruggles v. Illinois, 108 U. S. 526, 27 L. Ed. 812; United States v. Chase, 135 U. S. 255, 10 S. C. Rep. 756, 34 L. Ed. 117; Smith v. Townsend, 148 U. S. 490, 13 S. C. Rep. 634, 37 L. Ed. 533; Massachusetts L. & T. Co. v. Hamilton, 88 Fed. 588, 32 C. C. A. 46; In re Matthews, 109 Fed. 603;

was enacted is a matter of prime importance in arriving at a correct interpretation of its terms."⁵³

§ 472 (307). **Contemporaneous construction.**—The aid of contemporaneous construction is invoked where the language of a statute is of doubtful import and cannot be made plain by the help of any other part of the same statute, nor by the assistance of any act *in pari materia* which may be read with it, nor of the course of the common law up to the time of its enactment. Under such circumstances the court may consider what was the construction put upon the act when it first came into operation.⁵⁴ Where this has been given by enactment it is conclusive.⁵⁵ A contemporaneous construction is that which it receives soon after its enactment. This after the lapse of time, without change of that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the legislature. If there is ambiguity in the language, the understanding of the application of it when the statute first goes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law.⁵⁶ For more than twenty-five years street-railroad com-

Ellis County v. Thompson, 95 Tex. 22, 64 S. W. 927; Bowman v. State, 38 Tex. Crim. Rep. 14, 40 S. W. 796, 41 S. W. 635; Croomer v. State, 40 Tex. Crim. App. 672, 51 S. W. 924, 53 S. W. 882; Gorham v. Bishop of Exeter, Moore's Case of, 462; Hawkins v. Gathercole, 6 De G. M. & G. 1; Clark v. Janesville, 10 Wis. 136.

⁵³ Ellis County v. Thompson, 95 Tex. 22, 31, 64 S. W. 927.

⁵⁴ Wilb. on St. 142; 2 Inst. 11, 136; 1 Kent, Com. 465; Fermoy Peerage Claim, 5 H. L. Cas. at p. 747; Mor-

gan v. Crawshay, L. R. 5 H. L. at p. 315; Attorney-General v. Pri- mate, 1 Jebb & Symes, at p. 317.

⁵⁵ Philadelphia & Erie R. R. Co. v. Catawissa R. R. Co., 53 Pa. St. 20, 61.

⁵⁶ Packard v. Richardson, 17 Mass. 143, 9 Am. Dec. 123; 2 Inst. 181; People v. Loewenthal, 93 Ill. 191; Opinion of Justices, 126 Mass. 551; Hahn v. United States, 107 U. S. 403, 2 S. C. Rep. 494, 27 L. Ed. 527; Commonwealth v. Parker, 2 Pick. 550, 556; Scruggs v. Brackin, 4 Yerg. 528; Egnew v. Cochrane, 2

panies had been formed under the general railroad law of New York. Some of its provisions were such as could be applied to such companies and some were not. When the right was questioned it was held that this long practice and the acquiescence of the officers of the state therein was of very considerable, if not controlling, weight in the construction of the act and the practice was confirmed.⁵⁷ Where the statute is doubtful, a construction long acted upon by the inferior courts will generally be adopted and followed by the superior tribunals,⁵⁸ and especially as to rights which have accrued under it.⁵⁹ If the decisions are conflicting it cannot be said there is a contemporary exposition, and the court must look to the words of the statute and interpret them by its own unfettered judgment.⁶⁰ A construction of a statute that has been acted upon by the bench and bar for nearly half a century should not be disturbed.⁶¹ The common consent and opinion of the legal profession on a question of the construction and practical operation of a statute were held to be of persuasive force.⁶² A construc-

- Head, 320; Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257; Reg. v. Frost, 9 C. & P. 129; Sheppard v. Gosnold, Vaughan, 169; Mansell v. Reg., 8 E. & B. at p. 111; Gorham v. Bishop of Exeter, 15 Q. B. 69; Booth v. Ibbotson, 1 Y. & J. 360; Nelson v. Allen, 1 Yerg. 360, 376, 377; Harrison v. Willis, 7 Heisk. 35, 19 Am. Rep. 604; Simpson v. Willard, 14 S. C. 191; Martin v. Hunter, 1 Wheat. 351, 4 L. Ed. 97; Wanet v. Corbet, 13 Ga. 441; Howell v. State, 71 id. 224, 51 Am. Rep. 259; State v. Mayhew, 2 Gill, 487; Garland v. Carlisle, 2 Cr. & M. at p. 39; United States v. Ship Recorder, 1 Blatchf. 218, 223, Fed. Cas. No. 16,129; Windham v. Chetwynd, 1 Burr. at p. 419; Wilton v. Chambers, 7 Ad. & El. at p. 532; Bank of England v. Anderson, 3 Bing. N. C. 666; Hamilton v. McNeil, 13 Gratt. 394; 4 Bac. Abr. 648; Dean v. Borchsenius, 30 Wis. 236; People v. May, 3 Mich. 598; Re National Guard, 71 Vt. 493, 45 Atl. 1051; Pennoyer v. McConnaughy, 140 U. S. 1, 11 S. C. Rep. 699, 35 L. Ed. 363.
- ⁵⁷ Matter of Washington St. etc. R. R. Co., 115 N. Y. 442, 22 N. E. 356.
- ⁵⁸ Plummer v. Plummer, 37 Miss. 185.
- ⁵⁹ Id.
- ⁶⁰ Rex v. Leek Wootton, 16 East, at p. 122.
- ⁶¹ Swift v. Lenzer, 20 Ohio C. C. 667; Campbell v. Campbell, 3 Ohio C. C. 449.
- ⁶² Fears v. Riley, 148 Mo. 49, 49 S. W. 836.

tion of a constitution, if nearly contemporaneous with its adoption, and followed and acquiesced in for a long period of years afterwards, is never to be lightly disregarded, and is often conclusive.⁶³

§ 473 (308). **General usage and practical construction.**—If the words of a statute be doubtful a general usage may explain it, but it must be universal.⁶⁴ A practice in a part of the state inconsistent with the letter and spirit of a statute cannot repeal it nor control its construction.⁶⁵ A universal law cannot receive different interpretations in different localities;⁶⁶ but when a statute is applicable to one place only, doubtful words in it may be construed by the usage in that place.⁶⁷ Long usage is of no avail against a plain statute;⁶⁸ it can be binding only as the interpreter of a doubtful law, and as affording a contemporary exposition.⁶⁹ Where a statute, expressive as to some points, is silent as to others, usage may supply the defect, if not inconsistent with anything which it expresses.⁷⁰

§ 474 (309). A practical construction, of long standing, by those for whom the law was enacted, will not be lightly

⁶³ Opinion of Justices, 126 Mass. 551; 1 Kent's Com. 465 and note; Story on Const., § 408; Cooley, Const. Lim. 69; Surgett v. Lapice, 8 How. 48, 68, 12 L. Ed. 982; Commonwealth v. Lockwood, 109 Mass. 322, 339, 12 Am. Rep. 699; Commonwealth v. Costley, 118 Mass. 1, 36; Stuart v. Laird, 1 Cranch, 299, 2 L. Ed. 115; McCulloch v. Maryland, 4 Wheat. 316, 401, 4 L. Ed. 579; Portland Bank v. Apthorp, 12 Mass. 252, 257; Holmes v. Hunt, 122 Mass. 505, 516, 23 Am. Rep. 381; Fullington v. Williams, 98 Ga. 807, 27 S. E. 183; Duffy v. New Orleans, 49 La. Ann. 114, 21 So. 179; State v. Holcomb, 46 Neb. 88, 64 N. W. 437; Wallace v. Bradshaw, 54 N. J. L. 175, 23 Atl. 759.

⁶⁴ Rex v. Hogg, 1 T. R. 721; Dyer

v. Best, L. R. 1 Ex. 152; Earl of Waterford's Peerage, 6 Cl. & Fin. at p. 173; Bank of Ireland v. Evans's Charities, 5 H. L. Cas. 405; Bailey v. Rolfe, 16 N. H. 247; Chesnut v. Shane, 16 Ohio, 599.

⁶⁵ State v. Mayhew, 2 Gill, 487.

⁶⁶ St. Paull v. Lewis, 4 Watts, 402; Ham v. Sawyer, 38 Me. 37; Evans v. Myers, 25 Pa. St. 114.

⁶⁷ Frazier v. Warfield, 18 Md. 279.

⁶⁸ Goldsborough v. United States, Taney's Dec. 80, Fed. Cas. No. 5519; Missouri Pac. Ry. Co. v. Douglas, 3 Tex. Ct. App. (Civil Cas.) 32.

⁶⁹ Att'y-Gen'l v. Bank, 5 Ired. Eq. 71; Gwyn v. Hardwicke, 1 H. & N. 53; Pochin v. Duncombe, 1 H. & N. 856.

⁷⁰ Dunbar v. Roxburghe, 3 Cl. & Fin. 335.

questioned, especially in matters of form, though it will not be allowed to defeat the manifest purpose of the statute.⁷¹ This was held to aid the presumption that the principal was under disability when a deputy officer acts, having authority to act only when the principal is unable to act.⁷² The practical construction given by the interior department of the general government, in reliance upon the uniform opinions of the attorney-general's office, of a statute granting lands, should be followed by the state authorities until reversed by the federal courts.⁷³ Where a statute concerning the administration of tax-collectors' oaths has been uniformly construed in a certain way by the state and county authorities, and the construction has become a rule of property, many titles depending upon it, the maxim *communis error facit jus* may be invoked if the statute is doubtful.⁷⁴ The practical construction given to a doubtful statute by the department or officers whose duty it is to carry it into execution is entitled to great weight and will not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous.⁷⁵ Says the supreme

⁷¹ *Westbrook v. Miller*, 56 Mich. 148, 22 N. W. 256.

⁷² *Continental Imp. Co. v. Phelps*, 47 Mich. 299, 11 N. W. 167; *Clark v. Mowyer*, 5 Mich. 462; *Cameron v. Merchants', etc. Bank*, 37 id. 240; *Employers' L. Co. v. Commissioner of Ins.*, 64 id. 614, 31 N. W. 542.

⁷³ *Johnson v. Ballou*, 28 Mich. 379.

⁷⁴ *Malonny v. Mahar*, 1 Mich. 26.

⁷⁵ *In re State Lands*, 18 Colo. 359, 32 Pac. 986; *United States v. Colegrove*, 8 App. Cas. (D. C.) 255; *United States v. Bliss*, 12 App. Cas. (D. C.) 485; *Bloxhun v. Consumers' Elec. Light & St. R. R. Co.*, 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 E. R. A. 507; *Solomon v. Commissioners*, 41 Ga. 157; *Matheus v. Shores*, 24 Ill. 27; *Harrison v. Peo-*

ple, 97 Ill. App. 421; *Himrod Coal Co. v. Stevens*, 104 Ill. App. 639; *State Board v. Holliday*, 150 Ind. 216, 49 N. E. 14, 43 L. R. A. 826; *Harrison v. Masonic Mut. Benefit Society*, 61 Kan. 134, 59 Pac. 266; *Belknap v. Louisville*, 93 Ky. 444, 20 S. W. 309; *Clark's Run, etc. Turnpike Co. v. Commonwealth*, 96 Ky. 525, 29 S. W. 360; *Auditor v. Cain*, 22 Ky. L. R. 1888, 61 S. W. 1016; *Kiersted v. State*, 1 G. & J. 281; *People v. May*, 3 Mich. 598; *Ross v. Kansas City, etc. R. R. Co.*, 111 Mo. 18, 19 S. W. 541; *State v. Hannibal, etc. R. R. Co.*, 135 Mo. 618, 37 S. W. 532; *Forry v. Ridge*, 56 Mo. App. 615; *Barrett v. Stutsman County*, 4 N. D. 175, 59 N. W. 964; *Chesnut v. Shane*, 16 Ohio,

court of Oregon: "In all cases where those persons whose duty it is to execute a law have uniformly given it a particular construction, and that construction has been acquiesced in and acted upon for a long time, it is a contemporary exposition of the statute, which always commands the attention of the courts, and will be followed unless it clearly and manifestly appears to be wrong."⁷⁶ The legislature is presumed to be cognizant of such construction, and after long continuance, without any legislation evincing its dissent, courts will consider themselves warranted in adopting

599; *State v. Akins*, 18 Ohio C. C. 349; *Kelley v. Multnomah County*, 18 Ore. 356, 22 Pac. 1110; *Goddard v. Gloninger*, 5 Watts, 663; *Commonwealth v. Mann*, 168 Pa. St. 290, 31 Atl. 1003; *Commonwealth v. Allegheny County*, 168 Pa. St. 303, 31 Atl. 1061; *Price v. Lancaster County*, 189 Pa. St. 95, 41 Atl. 987; *State v. Campbell*, 3 Tenn. Cas. 355; *Houston & Tex. Cent. Ry. Co. v. State*, 95 Tex. 507, 62 S. W. 114; *Page v. Utah Commission*, 11 Utah, 119, 39 Pac. 499; *Re National Guard*, 71 Vt. 493, 45 Atl. 1051; *Scanlon v. Childs*, 33 Wis. 663; *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52; *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115; *Edwards v. Darby*, 12 Wheat. 206, 6 L. Ed. 603; *United States v. Bank*, 6 Pet. 29, 8 L. Ed. 308; *Union Ins. Co. v. Hoge*, 21 How. 35, 16 L. Ed. 61; *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396; *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *Brown v. United States*, 113 U. S. 568, 5 S. C. Rep. 648, 28 L. Ed. 1079; *The Laura*, 114 U. S. 411, 5 S. C. Rep. 881, 29 L. Ed. 147; *United States v. Lytle*, 5 McLean, 9, Fed. Cas. No. 15,652; *Hahn v. United States*, 14 Ct. of Cl.

305; *Swift Courtney, etc. Co. v. United States*, 14 Ct. of Cl. 481; *Schell's Ex'rs v. Fanché*, 138 U. S. 562, 11 S. C. Rep. 376, 34 L. Ed. 1042; *Heath v. Wallace*, 138 U. S. 573, 582, 11 S. C. Rep. 380, 34 L. Ed. 1063; *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 S. C. Rep. 699, 35 L. Ed. 363; *United States v. Ala. Great Southern R. R. Co.*, 142 U. S. 615, 12 S. C. Rep. 306, 35 L. Ed. 1134; *United States v. Union Pac. Ry. Co.*, 148 U. S. 562, 13 S. C. Rep. 724, 37 L. Ed. 560; *Hewitt v. Schultz*, 180 U. S. 139, 21 S. C. Rep. 309, 45 L. Ed. 463; *United States v. Finnel*, 185 U. S. 236, 22 S. C. Rep. 633, 46 L. Ed. 890; *Potter v. Hull*, 189 U. S. 292, 23 S. C. Rep. 545; *United States v. Sweet*, 189 U. S. 471, 23 S. C. Rep. 638; *People v. Fidelity & Casualty Co.*, 153 N. Y. 25, 38 N. E. 752; *Commonwealth v. Mann*, 168 Pa. St. 290, 31 Atl. 1003; *Commonwealth v. Paine*, 207 Pa. St. 45; *Atlantic & D. Ry. Co. v. Lyons*, 101 Va. 1; *Virginia C. & I. Co. v. Keystone, C. & I. Co.*, 101 Va. 723.

⁷⁶ *Kelley v. Multnomah County*, 18 Ore. 356, 359, 22 Pac. 1110.

that construction.⁷⁷ And where the statute is re-enacted without change the presumption is strong that the legislature intended it to bear the same construction that had previously been given it.⁷⁸ Where a statute regulating the manner of conducting a certain industry is ambiguous, the courts will receive as an aid the construction which practical persons, engaged in the industry, have generally placed upon it.⁷⁹ Contemporary construction, and official usage for a long period, by the persons charged with the administration of the law, are among the legitimate aids in the interpretation of statutes.⁸⁰ A practical construction to be of weight must be uniform,⁸¹ and if a particular construction has been acted upon for a number of years the courts will look with disfavor upon a change of construction by officials, especially when parties who have acted on the faith of such construction will be prejudiced.⁸²

If the meaning of a statute is clear and unambiguous a practical construction inconsistent with that meaning will have no weight and will not be followed.⁸³ A practical

⁷⁷ *State Board v. Holliday*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826; *Auditor v. Cain*, 22 Ky. L. R. 1888, 61 S. W. 1016; *The Anna*, L. R. 1 P. Div. 259.

⁷⁸ *Price v. Lancaster County*, 189 Pa. St. 95, 41 Atl. 987; *ante*, § 403.

⁷⁹ *Himrod Coal Co. v. Stevens*, 104 Ill. App. 639.

⁸⁰ *Wetmore v. State*, 55 Ala. 198; *Nelson v. Allen*, 1 Yerg. 376; *Tipton v. Davis*, 5 Hayw. 278; *People v. Dayton*, 55 N. Y. 377.

⁸¹ *United States v. Healey*, 160 U. S. 136, 16 S. C. Rep. 247, 40 L. Ed. 369; *United States v. Bashow*, 50 Fed. 749, 1 C. C. A. 653, 4 U. S. App. 360; *Wisconsin Cent. R. R. Co. v. United States*, 164 U. S. 190, 17 S. C. Rep. 45, 41 L. Ed. 399; *Burka v. Snively*, 208 Ill. 328.

⁸² *United States v. Ala. Great Southern R. R. Co.*, 142 U. S. 615, 12 S. C. Rep. 306, 38 L. Ed. 1134.

⁸³ *Massenburg v. Bibb County Commissioners*, 96 Ga. 614, 23 S. E. 998; *Connecticut Mut. Life Ins. Co. v. Wood*, 115 Mich. 444, 74 N. W. 656; *Galveston, H. & S. A. Ry. Co. v. State*, 81 Tex. 572, 17 S. W. 67; *Ramsey v. Tod*, 95 Tex. 614, 69 S. W. 133; *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, 68 N. W. 958; *United States v. Graham*, 110 U. S. 219, 3 S. C. Rep. 582, 28 L. Ed. 126; *St. Paul, M. & M. Ry. Co. v. Phelps*, 137 U. S. 528, 11 S. C. Rep. 168, 34 L. Ed. 767; *United States v. Tanner*, 147 U. S. 661, 13 S. C. 436, 37 L. Ed. 321; *United States v. Alger*, 152 U. S. 384, 14 S. C. Rep. 635, 38 L. Ed. 488; *Webster v. Luther*, 163

construction will not be followed when it would defeat the obvious purpose of the statute.⁸⁴ "If the language of an act be certain its object can never be frustrated by any amount of contemporaneous interpretation no matter how consistent or how widely adopted it may have been."⁸⁵

§ 475 (310). When a judicial interpretation has once been put upon a clause, expressed in a vague manner by the legislature, and difficult to be understood, that ought of itself to be a sufficient authority for adopting the same construction.⁸⁶ Buller, J., said: "We find one solemn determination of these doubtful expressions in the statute, and as that construction has since prevailed, there is no reason why we should now put another construction on the act on account of any supposed change of convenience."⁸⁷ This rule of construction will hold good even if the court be of opinion that the practical construction is erroneous; so that if the matter were *res integra* the court would adopt a different construction.⁸⁸ Lord Cairns said: "I think that with regard to statutes . . . it is desirable not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty."⁸⁹ Judicial usage and practice

U. S. 331, 16 S. C. Rep. 963, 41 L. Ed. 179; Wisconsin Cent. R. R. Co. v. United States, 164 U. S. 190, 17 S. C. Rep. 45, 41 L. Ed. 399; Studebaker v. Perry, 184 U. S. 258, 22 S. C. Rep. 463, 46 L. Ed. 528; Deweese v. Smith, 106 Fed. 438, 45 C. C. A. 408; Deming v. McClaughry, 113 Fed. 639, 51 C. C. A. 349.

⁸⁴ Webster v. Luther, 163 U. S. 331, 342, 16 S. C. Rep. 963, 41 L. Ed. 179.

⁸⁵ Commonwealth v. Railroad Companies, 95 Ky. 60, 23 S. W. 868.

⁸⁶ Williams v. Newton, 14 M. & W. at p. 757.

⁸⁷ Rex v. Younger, 5 T. R. at

p. 452. See Ellis v. Owens, 10 M. & W. at p. 521; Rex v. Great Driffield Inhabitants, 8 B. & C. at p. 690.

⁸⁸ State v. Chase, 5 H. & J. 303.

⁸⁹ Commissioners v. Harrison, L. R. 7 H. L. 9; McKeen v. Delancy, 5 Cranch, 22, 3 L. Ed. 25; Migneault v. Malo, L. R. 4 P. C. 136; Kernion v. Hills, 1 La. Ann. 419; Janvrin v. De la Mare, 14 Moore's P. C. 334; Kitchen v. Bartsch, 7 East, 53; Lord Advocate v. Sinclair, L. R. 1 Scotch App. 178; Jewison v. Dyson, 9 M. & W. 540; Nicol v. Paul, L. R. 1 Scotch App. 131; Evanturel v. Evanturel, L. R. 2 P. C. 462.

will have weight,⁹⁰ and when continued for a long time will be sustained though carried beyond the fair purport of the statute.⁹¹

§ 476 (311). The uniform legislative interpretation of doubtful constitutional provisions, running through many years, and a similar construction of statutes, has great weight.⁹² The contemporary and subsequent action of the legislature in reference to the subject-matter has been accepted as controlling evidence of the intention of a particular act.⁹³ Legislative construction of old laws has no judicial force; whether right or wrong the courts must determine the proper interpretation from the statutes themselves.⁹⁴ A practical construction of a statute of doubtful meaning, long continued and acquiesced in, and which has operated as a rule of property, and under which many important rights have accrued, will seldom be disturbed.⁹⁵ "We

⁹⁰ *McKeen v. Delancy*, 5 Cranch, 22, 3 L. Ed. 25; *Bailey v. Rolfe*, 16 N. H. 247; *Packard v. Richardson*, 17 Mass. 122, 144, 9 Am. Dec. 123; *Morrison v. Barksdale*, Harper, 101; *Att'y-Gen'l v. Bank of Cape Fear*, 5 Ired. Eq. 71; *Rogers v. Goodwin*, 2 Mass. 475; *Wetmore v. State*, 55 Ala. 198; *Plummer v. Plummer*, 37 Miss. 185; *Kernion v. Hills*, 1 La. Ann. 419; *Leigh v. Kent*, 3 T. R. at p. 364.

⁹¹ *Pease v. Peck*, 18 How. 595; *Reg. v. Scaife*, 17 Q. B. 238; *Smith v. Tilly*, 1 Keble, 712; *Leverson v. Reg.*, L. R. 4 Q. B. 394; *Clow v. Harper*, L. R. 3 Ex. Div. 198; *The Anna*, L. R. 1 P. Div. 259; *Reg. v. Cutbush*, L. R. 2 Q. B. 379; *Migneault v. Malo*, L. R. 4 P. C. 123, 136.

⁹² *Hardy, Ex parte*, 68 Ala. 303; *Attorney-General v. Preston*, 56 Mich. 181, 22 N. W. 261; *Commonwealth v. Miller*, 5 Dana, 320; *Moog v. Randolph*, 77 Ala. 597; *Selma*, etc.

R. R. Co., Ex parte, 45 id. 696, 6 Am. Rep. 722; *Fullington v. Williams*, 98 Ga. 807, 27 S. E. 183; *Duffy v. New Orleans*, 49 La. Ann. 114, 21 So. 179; *State v. Holcomb*, 46 Neb. 88, 64 N. W. 437; *Wallace v. Bradshaw*, 54 N. J. L. 175, 23 Atl. 759.

⁹³ *Doggett v. Walter*, 15 Fla. 355; *Bigelow v. Forrest*, 9 Wall. 339, 19 L. Ed. 696.

⁹⁴ *Drain Com'r v. Baxter*, 57 Mich. 127.

⁹⁵ *Rogers v. Goodwin*, 2 Mass. 475; *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115; *Matter of the Will of Warfield*, 22 Cal. 71, 83 Am. Dec. 49; *People v. Loewenthal*, 93 Ill. 191; *Brown v. State*, 5 Colo. 496; *Plummer v. Plummer*, 37 Miss. 185; *Nelson v. Allen*, 1 Yerg. 360; *Morgan v. Crawshaw*, L. R. 5 H. L. 304, 320; *State v. Chase*, 5 H. & J. 303; *State v. Severance*, 49 Mo. 401. In *Steiner v. Cox*, 4 Pa. St. 13, Gibson, C. J., had to deal with the effect of

cannot," say the court in an early case, "shake a principle which has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision [practice] is now supported is that long-continued usage furnishes a contemporaneous construction, which must prevail over the mere technical import of words."⁹⁶ In construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice under them, if the practice has continued for a considerable length of time.⁹⁷ Municipal practice under indefinite provisions of a charter that official terms should expire on the last day of March was applied in the construction of a statute giving one appointed a two-years' term.⁹⁸

§ 477 (312). An important consideration affecting the weight of contemporary judicial construction is the length of time it has continued. It is adopted, and derives great force from being adopted, soon after the enactment of the law. It may be, and is presumed, that the legislative sense of its policy, and of its true scope and meaning, permeates the judiciary and controls its exposition. Having received at that time a construction which is for the time settled, accepted, and thereafter followed or acted upon, it has the

a redemption from a tax sale permitted by an officer after the statutory period had elapsed. It had been permitted in pursuance of a practice which prevailed "to an almost unlimited extent." He said: "It will be necessary to distinguish between redemption by permission and a right to redeem, for the one may be good independent of the other." He reached the conclusion that the owner may not redeem by right, but may by permission, if not done by collusion. "The evidence to show the universality of

redemptions by permission was properly received; not, as was alleged, to prove a custom superior to the statutes, but to found an interpretation of them on the basis of the argument *ab inconvenienti*. It was evidence to the court, not to the jury."

⁹⁶ Rogers v. Goodwin, 2 Mass. 475.

⁹⁷ Sherwin v. Bugbee, 16 Vt. 444; State v. Severance, 49 Mo. 401; State v. Cook, 20 Ohio St. 252.

⁹⁸ French v. Cowan, 4 New Eng. Rep. 682, 79 Me. 426, 10 Atl. 335.

sanction of the authority appointed to expound the law, and under circumstances peculiarly favorable for reaching just and correct conclusions; when reached, they are, moreover, within the strongest reasons on which is founded the maxim of *stare decisis*. Such a construction is publicly given, and the subsequent silence of the legislature is strong evidence of acquiescence, though not conclusive.⁹⁹ But in respect to a practical construction and usage not having judicial sanction, long duration is of their very essence. They are but interpreters of an obscure law,¹ and to have weight should prevail for a long period, and their observance be uniform and notorious. Long periods have been mentioned as requisite or desirable in the English cases, varying from forty to five hundred years;² shorter periods in this country suffice.³ This difference may come from the legislation in America being comparatively modern. A local or special act, however, may be acted upon and practically construed by parties for whose purposes it was enacted, so as to induce an adoption of their construction without reference to the time occupied in such practical construction. Thus, where a city pursuant to due authority passed an ordinance for the subscription of stock and the issue of bonds in aid of a railroad, and this had been acted upon, the court said there had been a contemporary construction "placed upon an ordinance by the parties themselves, and on which they have acted, and upon which large and important interests have vested. Although this would not be controlling, if the language was clearly the other way, yet in doubtful cases it is entitled to, and should receive, weight."⁴ Lord Eldon, in *Attorney-*

⁹⁹ *State v. Bosworth*, 13 Vt. 402; *Clinton v. Englebrecht*, 13 Wall. 434, 10 L. Ed. 659; *Mayor of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *Ferris v. Higley*, 20 Wall. 375, 22 L. Ed. 383.

¹ *Bailey v. Rolfe*, 16 N. H. 247.

² *Mansell v. Reg.*, 8 E. & B. 54, 72, 111; *Dunbar v. Roxburghe*, 3 Cl. &

Fin. at p. 354; *Gorham v. Exeter*, 15 Q. B. 52, 69; *Fermoy Peerage Claim*, 5 H. L. Cas. 729, 785.

³ *Pease v. Peck*, 18 How. 595, 15 L. Ed. 518; *Clark v. Dotter*, 54 Pa. St. 215, 216; *United States v. Ship Recorder*, 1 Blatchf. 218, 223, Fed. Cas. No. 16,129.

⁴ *State v. Severance*, 49 Mo. 401.

General v. Forster,⁵ said: "According to Lord Hardwicke, usage would interpret the deed against the effect of any exposition upon the mere terms of the deed itself, if there was nothing else to resort to."

§ 478. An act provided that every railroad company should receive from the state a grant of sixteen sections of land for every mile of road constructed and put in running order, but not "for more than a single track with the necessary turnouts." The practical construction given to this statute by the governor and other officers whose duty it was to execute the law, had been to add the necessary turnouts to the length of single track, in computing the miles of road for which the grant should be made. The court intimated that the rule of strict construction applied to public grants might require a different result, but held that the practical construction long continued, and the fact that third parties had acquired rights dependent upon that construction, required the court to adhere to such construction, the statute itself being ambiguous.⁶ Where a turnpike charter was ambiguous as to whether toll-gates could be erected at pleasure by the company or only once in five miles, and the company had acted upon the former construction and the public and officials who might have objected and prosecuted the company for a violation of their charter having acquiesced for thirty years, the court accepted the construction so put upon the act, though here also the court was construing a public grant.⁷ Where the boundary line of a city as fixed by a statute was uncertain, it was held that the practical construction of the act by fixing a boundary, which had been acquiesced in by the city and property owners for twenty years, should not be disturbed.⁸ A statute required the property of railroad companies to be assessed by the state comptroller as an entirety. In practice

⁵ 10 Ves. at p. 338.

v. Commonwealth, 96 Ky. 525, 29

⁶ Houston & Tex. Cent. Ry. Co. v. State, 95 Tex. 507, 62 S. W. 114.

S. W. 360.

⁸ Belknap v. Louisville, 93 Ky.

⁷ Clark's Run, etc. Turnpike Co. 444, 20 S. W. 309.

this had been applied to street railroads, though confined to a single county or city. This practical construction was held to have great persuasive force, and the re-enactment of the statute after such construction was held to give legislative sanction to it.⁹ The charter of Kansas City as passed in 1889 contained a provision as follows: "The mayor shall call special sessions of the common council by proclamation, *which shall be published as may be provided by ordinance.*" Prior to 1889 the provision had been in force without the italics and special sessions had been called by proclamation merely. After 1889 no ordinance was passed to provide for the publication of such proclamations and special sessions continued to be called and held as before. It was held that under the charter there was no power to call special meetings until an ordinance was passed prescribing the manner of publication, but in view of the long practice to the contrary the acts of such special sessions were upheld. The court says: "However, since the city officers, the public, lawyers and judiciary have, in the practice of several years, acted upon a different understanding of what is necessary to convene special sessions of the common council; and since the language of the charter gave some color to such interpretation, and since, too, a contrary holding now as to such meetings in the past would unsettle numerous titles, distract, if not destroy, many private interests and impair the public faith and confidence in a great variety of merely governmental regulations adopted at these special meetings, we feel constrained to uphold their legality notwithstanding our conviction that such sessions were not called as the charter in fact intended they should be."¹⁰

§ 479 (313). *Stare decisis*.—The certainty and stability of the law are among its chief excellencies. By following this legal injunction the common law has become a sym-

⁹ *Bloxham v. Consumers' Elec. Light & Street R. R. Co.*, 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507.

¹⁰ *Forry v. Ridge*, 56 Mo. App. 615, 622, 623.

metrical system; the same authoritative rule applied to statutory construction gives a wholesome precision to dubious generalities, and otherwise removes doubts which arise upon obscure provisions, and has a salutary tendency to give confidence to those who must act upon statutes, but cannot settle their meaning. The rule of *stare decisis* is the authority of judicial decisions as precedents in subsequent litigation. When a point has been once settled by decision, it forms a precedent which is not afterwards to be departed from.¹¹ Such precedents must from the nature of our legal system be the same to the science of the law as a convincing series of experiments is to any other branch of inductive philosophy. They are, on being promulgated, immediately relied upon, according to their character, either as confirming an old or forming a new principle of action, which, perhaps, is at once applied to thousands of cases. These are continually multiplying. Numerous and valuable rights, offensive and defensive, may be claimed under them. The court almost always, in deciding any question, creates a moral power above itself; and when the decision construes a statute, it is legally bound for certain purposes to follow it as a decree emanating from a paramount authority, according to its various applications in and out of the immediate case.¹² "The doctrine is not founded upon a mere rule of practice, changeable at the pleasure of the courts, but upon the solid basis of justice, and vitally and essentially affects the rights and interests of defendants."¹³ It is a rule applicable to all questions of law, whether declaring a principle of the common law or the construction of a statute. A deliberate decision on a point of law given in a case becomes authority in other like cases; it is then the highest evidence of what the law is applicable to the subject; it should be followed unless reversed by a superior court or changed by the legislature,¹⁴ unless the law was manifestly misunderstood or

¹¹ Abb. L. Dic. 497.

¹⁴ Lemp v. Hastings, 4 Greene

¹² Bates v. Relyea, 23 Wend. 340, (Iowa), 448; Emerson v. Atwater, 341.

7 Mich. 23.

¹³ Shields v. Perkins, 2 Bibb, 230.

misapplied in the case decided; and even then, after long adherence to that error, it may become fixed and incapable of judicial correction. If it were otherwise, the public would suffer great inconvenience. It is only by the notoriety and stability of legal principles and rules as they are defined, declared and illustrated in judicial precedents that all human affairs may be regulated by one standard; that professional men can give safe advice to those who consult them; that people in general can venture with confidence to buy and trust, and to deal with each other.¹⁵

§ 480 (314). There is a distinction in the application of this rule between questions which concern practice, or those rules of conduct which have a mere present importance, and those which affect the validity and control the construction of contracts, or are rules of property. As to the former, legal precedents are followed unless they are manifestly wrong.¹⁶ As to the latter, they are followed with more persistency.¹⁷ The importance, in a general sense, of stable laws induces a conservative opposition to vacillation in even the

¹⁵ 1 Kent's Com. 476.

¹⁶ *Duff v. Fisher*, 15 Cal. 375, 381; *Commonwealth v. Miller*, 5 Dana, 320; *State v. Thompson*, 10 La. Ann. 122; *Reg. v. Chantrell*, L. R. 10 Q. B. 587; *Waldo v. Bell*, 13 La. Ann. 329; *Davidson v. Allen*, 36 Miss. 419; *State v. Wapello Co.*, 13 Iowa, 388; *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *Sydnor v. Gascoigne*, 11 Tex. 455; *Borden v. State*, 11 Ark. 519, 54 Am. Rep. 217; *Greencastle Southern T. Co. v. State*, 28 Ind. 383; *Succession of Lauve*, 6 La. Ann. 529; *Seale v. Mitchell*, 5 Cal. 403; *Wolf v. Lowry*, 10 La. Ann. 272; *People v. Cicott*, 16 Mich. 283; *New Orleans v. Poutz*, 14 La. Ann. 853; *Romaine v. Kinshiner*, 2 Hilt. 519; *Harvey v. Travelers' Ins. Co.*, 18 Colo. 354, 32 Pac. 935; *Rosse v. St. Paul & Duluth Ry. Co.*, 68 Minn.

216, 71 N. W. 20, 64 Am. St. Rep. 472; *Colorado Cemetery v. Arapahoe County*, 30 Colo. 507, 71 Pac. 410.

¹⁷ 1 Kent, 475, 476; 27 Am. Dec. 632; *In re Warfield*, 22 Cal. 51, 81 Am. Dec. 49; *Panaud v. Jones*, 1 Cal. 488; *Rogers v. Goodwin*, 2 Mass. 475; *Aicard v. Daly*, 7 La. Ann. 612; *Farmer's Heirs v. Fletcher*, 17 id. 142; *Van Loon v. Lyon*, 4 Daly, 149; *Day v. Munson*, 14 Ohio St. 488; *Reed v. Ownby*, 44 Mo. 204; *Hihn v. Courtis*, 31 Cal. 403; *Meriam v. Harsen*, 2 Barb. Ch. 270; *Picche v. Paul*, 22 Cal. 110; *Fisher v. Horicon I. Co.*, 10 Wis. 355; *Van Winkle v. Constantine*, 10 N. Y. 425; *Kirby v. Runals*, 140 Ill. 289, 29 N. E. 697; *Adams v. Bank of Oxford*, 78 Miss. 532, 29 So. 852; *Steedman v. Dobbins*, 93 Tenn. 397, 24 S. W. 1133.

methods of administering justice, and has made the rule of *stare decisis* universally applicable; in some cases imperative, in others at least a precept. "Where a question has been well considered," says Harris, J., "and deliberately determined, whatever might have been the views of the court before which the question is again brought, had it been *res nova*, it is not at liberty to disturb or unsettle such decision unless impelled by the most cogent reasons. 'I cannot legislate,' said Lord Kenyon, 'but by my industry I can discover what my predecessors have done, and I will tread in their footsteps.'" ¹⁸

§ 481 (315). Where a rule of property has been established it is deemed better to let it stand, although subsequent experience may show it to be erroneous.¹⁹ It can only be changed by a new act without unsettling titles.²⁰ The supreme court of Indiana said: "There are some questions in law, the final settlement of which is vastly more important than how they are settled; and among these are rules of property long recognized and acted upon, and under which rights have vested. A decision cannot be changed without producing confusion in titles, as the ruling would necessarily relate back to the time when the law came in force. If a canon of descent, for instance, as settled by the determination of the court of last resort, is unjust, or even distasteful, the legislature can change it by a new statute, without interfering with vested rights."²¹ It was objected in a case that a judicial sale had been ordered on a petition which did not show the jurisdictional facts.²² But upon the same principles involved in the objection two former cases had decided in effect that such omission was a mere irreg-

¹⁸ *Baker v. Lorillard*, 4 N. Y. 261.

¹⁹ *Kirby v. Runals*, 140 Ill. 289, 29 N. E. 697; *Steedman v. Dobbins*, 93 Tenn. 397, 24 S. W. 1133.

²⁰ *York's Appeal*, 17 W. N. C. 33; *S. C.*, 110 Pa. St. 69; *Hering v. Chambers*, 103 Pa. St. 172, 176; *Tuttle v. Griffin*, 64 Iowa, 455, 20 N. W. 757;

Bane v. Wick, 6 Ohio St. 13; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159; *Seale v. Mitchell*, 5 Cal. 401.

²¹ *Rockhill v. Nelson*, 24 Ind. 422; *Ewing v. Ewing*, id. 470.

²² *Field's Heirs v. Goldsby*, 28 Ala. 218.

ularity; it was deemed a rule of property, and ought not to be disturbed. The legislature had passed a special act authorizing a guardian named to sell the lands of his ward, and the question of the validity of that sale was afterwards solemnly adjudicated and sustained. After a period of eleven years the court said of that decision, "every consideration of policy admonishes us, even if we believed that there was room to doubt as to the correctness of the decision in that case, not to enter upon a review of it nor disturb it at this late day. All questions which have an important bearing upon titles to property, and which have, as in this instance, been once carefully considered and solemnly settled by the court, ought not to be treated as open for future investigation, unless it shall appear that the evil resulting from the principle established must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications upon the subject."²³

§ 482 (316). No absolute rule can be given as to when *stare decisis* is imperative, so much depends on the particular case in which it may be invoked. For it must be confessed that hasty and ill-considered decisions are sometimes made, and even of such a nature as to become rules of property; decisions so obviously against law that they ought, in vindication of the law, to be overruled, and in a multitude of instances have been.²⁴ When this has occurred, however, there has been a thoughtful comparison of the consequences; and when such adjudications have been departed from, it has been because the benefits of adherence to the law are anticipated to be more than sufficient to counterbalance the hardship to those who will be disappointed by annulling the aberrant case or cases.²⁵ Courts are not required, in the exercise of their wide judicial discretion, to overturn prin-

²³ *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159. *Neal*, 6 Pet. 291, 8 L. Ed. 402; *Hall v. Newcomb*, 3 Hill, 233, 7 id. 416,

²⁴ *Chesnut v. Shane*, 16 Ohio, 599, 47 Am. Dec. 387; *Hickman v. Gaither*, 2 Yerg. 200. See *Green v.*

42 Am. Dec. 82. ²⁵ *Id.*; *Grubbs v. State*, 24 Ind. 295.

ciples which have been considered and acted upon as correct, and thereby disturb contracts and property, and involve everything in inexplicable confusion, simply because some abstract principle of law has been incorrectly established in the outset.²⁶ The maxim of *stare decisis* is one of great importance in the administration of justice, and ought not to be departed from for slight or trivial causes; yet this rule has never been carried so far as to preclude courts from investigating former decisions when the question has not undergone repeated examination and become well settled.²⁷ It has been held that the doctrine of *stare decisis* should not be applied to prevent the reconsideration of the construction of a statute when there has been but one decision on the subject and that rendered by a divided court, and when such decision appears to the court, as afterwards constituted, to be palpably erroneous.²⁸

§ 483 (317). "The two grounds of justification," says Mr. Wells, "in departing from even a single decision which has become a general rule of property within a certain line of dealing, are (1) the necessity of preventing further injustice; (2) the necessity of vindicating clear and obvious principles of law. When these do not exist, a proposition for change cannot be entertained."²⁹ If infinite mischief would ensue should the court, in the construction of a statute, adopt a different rule from that which has been long established in the state, it will yield the construction which it would otherwise put on the words of the statute to that interpretation which has been universally received and long acted upon.³⁰ This maxim has been applied to decisions construing constitutions as well as other written laws. The following excerpt from a dissenting opinion of Paine, J., in a Wisconsin case, explains very clearly, in accordance with

²⁶ Welch v. Sullivan, 8 Cal. 188.

²⁹ Wells on Stare Decisis, § 598.

²⁷ Bowers v. Green, 1 Scam. 42.

³⁰ Van Loon v. Lyon, 4 Daly, 149;

²⁸ Postal Tel. Cable Co. v. Farmville & P. R. R. Co., 96 Va. 661, 32 S. E. 468.

McKeen v. Delancy's Lessee, 5 Cranch, 32, 3 L. Ed. 25; Giblin v. Jordan, 6 Cal. 416.

the general course of authority, the considerations which weigh to induce a greater or less persistent adherence to previous adjudications:

“The following positions are fairly to be derived from the authorities, and are clearly supported by reason: That the maxim *stare decisis* has greater or less force according to the nature of the question decided; that there are many questions upon which there is no objection to a change of decision other than grows out of those general considerations which favor certainty and stability in the law. There are questions where the decisions did not constitute a business rule, and where a change would invalidate no business transactions conducted upon the faith of the first adjudication. As an illustration take a case involving personal liberty: A party restrained of his liberty claims to be discharged under some constitutional provision; the court erroneously decides against him; the same question arises again. To change such a decision would destroy no rights acquired in the past; it would only give better protection in the future. The maxim in such a case would be entitled to but very little weight, and mere regard for stability ought not to be allowed to prevent a more perfect administration of justice. But where a decision relates to certain modes of doing business, which business enters largely into the daily transactions of the people of a state, and a change of decision must necessarily invalidate everything done in the mode prescribed by the first, then, when a decision has been once made and acted on for any considerable length of time, the maxim becomes imperative, and no court is at liberty to change. Take a case involving the validity of certain modes of executing deeds or wills. A decision is made, and the people act upon it for years, executing all such instruments in the manner prescribed. After that some one raises the question again and contends that the first decision is erroneous. Admit it to have been so; would the court be justified in overruling it? Every man, whether lawyer or layman, would answer no. It is true that as to

such questions it was more a matter of indifference how they were first decided, than as to one like the present involving a constitutional principle designed to secure so just an end as equality of taxation. And I admit that this fact makes some distinction between the cases, and might justify a struggle to regain the lost ground of constitutional justice, even at the expense of some inconvenience and hardship. But it is equally as true in this case as in those supposed that the decision constituted a business rule, involving the validity of the entire revenue transactions of the state, and of all the thousands of private contracts growing out of them, and having been acquiesced in and acted on for such length of time, the error had passed beyond the reach of judicial remedy. No case can be found where any court ever changed a decision once made, conceding that the change must have such an effect. On the contrary, there are many cases which would almost sustain the proposition that the practical construction of mere administrative officers, which has been acquiesced in for a long time, without any judicial decision whatever, should, in such cases, be followed, though in conflict with the constitution. I think that doctrine has been carried too far; but where there has been a judicial decision, the reason upon which it is based then becomes unanswerable. It is said that in looking at the consequences of a change to see whether we are at liberty to make it, we are setting aside the constitution, upon grounds of policy. . . . The maxim *stare decisis*, it is true, rests upon grounds of policy. But it is equally as true that the constitution itself intended that that maxim should exist in the judicial system which it established, and should be applied to decisions relating to its own construction, as well as to those relating to any other legal questions.”³¹

§ 484 (318). What decisions involve a rule upon which continuing rights will accrue, and needing adherence to them

³¹Kneeland v. Milwaukee, 15 Wis. 454. See Willis v. Owen, 43 Tex. 48; Louisville, etc. R. R. Co. v. County Court, 1 Sneed, 668.

for the protection of such rights, is determined from the nature of the principle decided. An adjudication of a nature to be a rule of property will be presumed after the lapse of time to have been acted upon, so that rights have actually vested under it and are dependent upon it. To presume otherwise is to assume that the law is idle and vain, not practical.³² The decisions to be upheld as precedents embrace not only the point necessarily involved in them and decided by them, but also the principles which subsequent cases declare to be decided by them.³³ "Courts seldom undertake in any case to pass upon the validity of legislation where the question is not made by the parties; their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the acts, because that point might have been raised and determined in the first instance."³⁴ A statute required railroad companies to fence their tracks and made them liable for all damages sustained by any person in consequence of their neglect or failure to comply with the law. This was first construed as intended merely to prevent animals coming on to the track, and it was held not to apply to infants who were injured by coming on to an unfenced track.³⁵ Fifteen years later the question arose again and the court was of a contrary opinion and overruled its former decision, holding that it was not a rule of property, and that the acquiescence of the legislature in the decision for

³² Davidson v. Allen, 36 Miss. 419.

³⁴ Boyd v. Alabama, 94 U. S. 645,

³³ Wells on Stare Decisis, § 601; 648, 24 L. Ed. 302.

Matheson v. Hearin, 29 Ala. 210.

³⁵ Fitzgerald v. St. Paul, 29 Minn. 336, 13 N. W. 168.

that period was not entitled to much weight.³⁶ In *Eau Claire National Bank v. Benson*³⁷ the court says: "No matter what the situation may appear to be, as to the unjust operation of a law, courts should not struggle to change it as it has been understood to exist and has been plainly written into its decisions for years, or by fine distinctions between cases and by rejecting the reasoning upon which they were grounded, as *obiter*, or by treating reasons given for a conclusion reached as to the intent of the law-making power as reasons given to justify an arbitrary construction of it, try to fit a decision to some case of peculiar hardship, so as to work out a supposed equitable result in that particular case or class of cases, that is really barred by the law, independent of the result of such struggle."

§ 485 (319). A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of those rights. To divest them by a change of the construction is to legislate retroactively.³⁸ The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded so as to affect the obligations of existing contracts made on the faith of the earlier adjudications. "The sound and true rule is," says Taney, C. J., "that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state or decision of its courts altering the construction of the law."³⁹

³⁶ *Rosse v. St. Paul & D. Ry. Co.*, 68 Minn. 216, 71 N. W. 20, 64 Am. St. Rep. 472.

³⁷ 106 Wis. 624, 628, 82 N. W. 604.

³⁸ *Rowan v. Runnels*, 5 How. 134, 12 L. Ed. 85; *Douglas v. Pike Co.*, 101 U. S. 677, 686, 25 L. Ed. 968; *Ohio Life Ins. & Tr. Co. v. Debolt*, 16 How. 416, 14 L. Ed. 997; *Super-*

visors v. United States, 18 Wall. 71, 21 L. Ed. 771; *Fairfield v. County of Gallatin*, 100 U. S. 47, 25 L. Ed. 544.

³⁹ *Ohio L. Ins. & Tr. Co. v. Debolt*, 16 How. 416, 432, 14 L. Ed. 997; *Myers v. Boyd*, 144 Ind. 496, 43 N. E. 567; *Adams v. Bank of Oxford*, 78 Miss. 532, 29 So. 852.

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same, in its effect on contracts, as an amendment of the law by means of a legislative enactment."⁴⁰

§ 486 (320). The maxim of *stare decisis* applies only to decisions on points arising and decided in causes; it has been held not to extend to reasoning, illustrations and references in opinions. The precedent includes the conclusions only upon questions which the case contained, and which were decided.⁴¹ "The members of a court," says Downey, C. J., "often agree in a decision, but differ decidedly as to the reasons or principles by which their minds have been led to a common conclusion. It is therefore the conclusion only, and not the process by which it has been reached, which is the decision of the court, and which has the force of precedent in other cases. The reasoning adopted, the analogies and illustrations presented in real or supposed cases, in an opinion, may be used as argument in other cases, but not as authority. In these the whole court may concur, or they may not. So of the principle concurred in, and laid down as governing the point in judgment, so far as it goes or seems to go beyond the case under consideration."⁴² The precedent must include necessarily the logic and reasoning of a syllogistic legal proposition of which the judgment is

⁴⁰ *Douglas v. Pike Co.*, 101 U. S. 677, 687, 25 L. Ed. 968; *Tayloe v. Thomson*, 5 Pet. 358, 8 L. Ed. 154; *Geddes v. Brown*, 5 Phila. 180; *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358; *Hardingsburg v. Cravens*, 148 Ind. 1, 47 N. E. 153; *Levy v. Hitsche*, 40 La. Ann. 500, 4 So. 472; *St. Louis, Oak Hill & C. Ry. Co. v. Fowler*, 142 Mo. 670, 44 S. W. 771; *Mountain Grove Bank v. Douglas County*, 146 Mo. 42, 47 S. W. 944; *Sedalia v. Gold*, 91 Mo. App. 32. See *Storie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460.

⁴¹ *Lucas v. Commissioners*, 44 Ind. 541.

⁴² *Lucas v. Commissioners*, 44 Ind. 524; *Louisville, etc. R. R. Co. v. County Court*, 1 Sneed, 637, 62 Am. Dec. 434; *Carroll v. Carroll*, 16 How. 275, 14 L. Ed. 936.

the conclusion.⁴³ If the major premise, which is the law of the case, may be stated in several forms, and is stated differently by different members of the court who join in the conclusion, this diversity will impair the force of the precedent. A judicial decision is to be regarded as conclusive, not only of the point presented in argument and expressly decided, but of every other proposition necessarily involved in reaching the conclusion expressed.⁴⁴ An opinion of the supreme court is the law of the case in which it is pronounced on a new trial, and in that court on a second review.⁴⁵ A construction put upon the constitution by the supreme court of a state under which a certain practice in legislation has grown up will be adhered to.⁴⁶

§ 487 (321). **Effects and consequences.**—In the construction of statutes, where the language is obscure or ambiguous, or for any reason its precise intent is not plain and cannot be made so by the context or other statutes *in pari materia*, the effects and consequences enter with more or less force into consideration; nor are they entirely ignored in

⁴³ 3 Black. Com. 396; *Lamphear v. Buckingham*, 33 Conn. 237.

⁴⁴ *Bloodgood v. Grasey*, 31 Ala. 575, 587. In this case Walker, J., said: "It was contended in the discussion of this case that the only point decided, or in the mind of the court, was that made in argument. The result of that position would be to take from judicial decisions, where there was no opinion, the authority of an adjudication upon all propositions which were too plain or too well recognized by the bench and bar to be questioned; and thus the universal and undisputed sanction of a legal principle would become a barrier to proof by judicial decisions of its existence. It better accords with reason to re-

gard a judicial tribunal as asserting, and intending to assert, every proposition which is indispensable to the conclusion expressed, and necessarily involved in it; at least, when the contrary does not appear."

⁴⁵ *Dewey v. Gray*, 2 Cal. 374; *Bane v. Wick*, 6 Ohio St. 13; *Gray v. Gray*, 34 Ga. 499; *Thomason v. Dill*, 34 Ala. 175; *Stein v. Ashby*, 30 id. 363; *Huffman v. State*, id. 532; *Pearson v. Darrington*, 32 id. 227; *Stacy v. Vermont. etc. R. R. Co.*, 33 Vt. 551; *Parker v. Pomeroy*, 2 Wis. 112.

⁴⁶ *State v. County Court*, 123 Mo. 427, 30 S. W. 103, 31 S. W. 23; *In re King's Estate*, 105 Iowa, 320, 75 N. W. 187.

the reading of any statute.⁴⁷ "A result which may follow from one construction or another of a statute is always a potent factor and is sometimes in and of itself conclusive as to the correct solution of the question as to its meaning."⁴⁸ But when the terms of a statute are plain, unambiguous and explicit, the courts are not at liberty to go outside of the language to search for a meaning which it does not reasonably bear.⁴⁹ The courts have nothing to do with the wisdom or policy of an act when the meaning is free from doubt.⁵⁰ When there is no express repeal none is presumed to be intended; and the effect of a new statute in conjunction with other statutes, with reference to established institutions, systems and policies, is always in view.⁵¹ It is pre-

⁴⁷ *Bowen v. Smith*, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491; *Kane v. Kansas City, etc. Ry. Co.*, 112 Mo. 34, 20 S. W. 532; *Lamar Water & E. L. Co. v. Lamar*, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 757, 32 L. R. A. 157; *State v. Moore*, 96 Mo. App. 431, 70 S. W. 512.

⁴⁸ *Roland Park Co. v. State*, 80 Md. 448, 453, 31 Atl. 298. Also *State v. Rodecker*, 145 Mo. 450, 46 S. W. 1083; *German Am. Bank v. Carondelet Real Est. Co.*, 150 Mo. 570, 51 S. W. 691.

⁴⁹ *In re King's Estate*, 105 Iowa, 320, 75 N. W. 187; *Powell v. Smith*, 74 Miss. 142, 20 So. 872; *McGowan v. Met. Life Ins. Co.*, 57 N. J. L. 390, 30 Atl. 433; S. C. affirmed, 60 N. J. L. 198, 38 Atl. 671; *Randall v. Richmond & D. R. R. Co.*, 107 N. C. 748, 12 S. E. 605, 11 L. R. A. 460; *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262; *State v. Franklin County Savings Bank*, 74 Vt. 246; *Appleton W. W. Co. v. Appleton*, 116 Wis. 363, 93 N. W. 262; *Queen v. Hopkins*, (1893) 1 Q. B. 621; *United States v. The Sadie*, 41 Fed. 396.

⁵⁰ *Wilson v. Cedarville*, 109 Ill. App. 316; *Cole v. Humphries*, 78 Miss. 163, 28 So. 808; *Prison Association v. Ashby*, 93 Va. 667, 25 S. E. 893; *Queen v. Hopkins*, (1893), 1 Q. B. 621; *ante*, § 118. In *Point Roberts Fishing Co. v. George & B. Co.*, 28 Wash. 200, 68 Pac. 438, the court says: "But courts are not at liberty to ignore statutes because it may find that their application leads to absurd, incongruous, or even mischievous results. The wisdom of a statute, its expediency and policy are legislative, not judicial questions. When, therefore, the meaning of a statute is clear, the courts can but give it effect, unless, of course, it violates some principle of fundamental law which the legislature is bound to observe." p. 204.

⁵¹ *Greenhow v. James*, 8 Va. 636; *Baxter v. Tripp*, 12 R. I. 310; *Grenada Co. Supervisors v. Brogden*, 112 U. S. 261, 5 S. C. Rep. 125, 28 L. Ed. 704; *Att'y-Gen'l v. Smith*, 31 Mich. 359; *Blackwood v. Van Vleit*, 30 id. 118; *Rowley v. Stray*, 32 id.

sumed that there is no intention to affect them any further than the plain terms of the new statute require.

Although the word "citizen," used in its most common and comprehensive sense, includes women, yet an act providing for the admission of a citizen of proper residence, age and character to practice as an attorney has been held not to include women, because such construction would be a departure from the antecedent policy of the legislature, and introduce a fundamental change in long-established principles.⁵² Courts will be very reluctant to overturn them, or essentially modify them by extending the operation of a dubious statute.

§ 488 (322). "In the consideration of the provisions of any statute, they ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the existing rights of the public, or of individuals, be not infringed."⁵³ Considerations of what is reasonable,⁵⁴

70; *Burnham v. Onderdonk*, 41 N. Y. 425; *Fort v. Burch*, 6 Barb. 60; *Minet v. Leman*, 20 Beav. 269; *Lindsey v. Rottaken*, 32 Ark. 619.

⁵² *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239; *Bradwell's Case*, 15 Ill. 535; *Goodell's Case*, 39 Wis. 232, 20 Am. Rep. 42; *Bradwell v. State*, 16 Wall. 130, 21 L. Ed. 442. See *Opinion of Justices*, 136 Mass. 578.

⁵³ *Wales v. Stetson*, 2 Mass. 146.

⁵⁴ *Haney v. State*, 34 Ark. 263; *State v. De Gress*, 53 Tex. 387; *Quin v. O'Keeffe*, 10 Ir. C. L. (N. S.) 411; *Church v. Crocker*, 3 Mass. 17, 21; *Commonwealth v. Cambridge*, 20 Pick. 267, 272; *Goddard v. Boston*, id. 407; *Commonwealth v. Baily*, 13 Allen, 541, 545; *Paddock v. Cameron*, 8 Cow. 212; *Van Rensselaer v. Sheriff*, 1 id. 443, 456; *Kephart v. Farmers', etc. Bank*, 4 Mich. 602;

Green v. Graves, 1 Doug. (Mich.) 351; *Bixon v. Caledonian Ry. Co., L. R. 5 App. Cas. 827*; *Glenn v. Lopez*, 1 Harper, 105; *Neenan v. Smith*, 50 Mo. 525. A statute will not be construed to require a vain thing. *Butler v. Rochester*, 4 Hun, 321. When it requires notice, it will require a reasonable notice. *Burden v. Stein*, 25 Ala. 455. On general words reasonable limitations will be imposed. *Martin v. Robinson*, 67 Tex. 368, 379; *McFarland v. Stone*, 17 Vt. 173, 44 Am. Dec. 325; *Ricard v. Williams*, 7 Wheat. 59, 115, 5 L. Ed. 398. A reasonable time has no determinate number of days or months, as applied to every case, but must be determined in each case upon all the elements of it which affect that question. *Thompson v. Strickland*, 52 Miss. 574.

convenient,⁵⁵ or causes hardship and injustice,⁵⁶ have a potent influence in many cases. It is always assumed that the legislature aims to promote convenience, to enact only what is reasonable and just. Therefore, when any suggested construction necessarily involves a flagrant departure from this aim, it will not be adopted if any other is possible by which such pernicious consequences can be avoided.⁵⁷ In Queen

⁵⁵ Putnam v. Longley, 11 Pick. 489; In re Alma Spinning Co., L. R. 16 Ch. Div. 686; Shute v. Wade, 5 Yerg. 8; Horne v. Railroad Co., 1 Cold. 72, 78; Van Rensselaer v. Sheriff, 1 Cow. 443, 457. C., a German, came to this country with a woman whom he held out as his wife, with whom he lived many years as such, and by whom he had several children. He afterwards abandoned her and went away. After he had been gone eight or nine years, she, not having heard of him, and supposing him to be dead, married another man by whom she had children. After the death of this man C. returned. On the settlement of his estate a question of the legitimacy of the children of the second marriage was raised in Brower v. Bowers, 1 Abb. App. Dec. 214. Harris, J., said: "I am inclined to think that the fact that they came from Germany, professing to be husband and wife, that they lived together in that relation for several years, and had children who were acknowledged as the issue of such a marriage, is sufficient evidence of a marriage in fact, even though it may have the effect to invalidate a subsequent marriage. A very considerable portion of the population of our country is made up of European emi-

grants. Of these a large proportion are married when they arrive here; and even when marriages are celebrated here, so migratory are the habits of the American people that in many cases it would be no easy thing to prove a marriage by those who witnessed the ceremony. It is well remarked by Tilghman, C. J., in Chambers v. Dickson, 2 Serg. & R. 475, that, in establishing rules of evidence, arguments from inconvenience have just weight. And we must pay great attention to the situation of our own country, which is not in all instances adapted to regulations that are very proper in other countries."

⁵⁶ Plumstead Board of Works v. Spackman, L. R. 13 Q. B. Div. 878; Lombard v. Trustees, etc., 73 Ga. 322; Collins v. Carman, 5 Md. 503.

⁵⁷ Metropolitan Asylum Dist. v. Hill, L. R. 6 Ap. Cas. 208; Richards v. Dagget, 4 Mass. 537; State v. Wiltz, 11 La. Ann. 439; Bell v. Jones, 10 Md. 322; Robinson v. Varnell, 16 Tex. 382; Ham v. McClaws, 1 Bay, 92; United States v. Hunter, Pet. C. C. 10, Fed. Cas. No. 15,428; Flint R. St. Co. v. Foster, 5 Ga. 201, 48 Am. Dec. 248; McLelland v. Shaw, 15 Tex. 319; Reg. v. Mallow Union, 12 Ir. C. L. (N. S.) 35; River Wear Com'rs v. Adamson, L. R. 2 Ap. Cas. 743; Mersey Steel & Ir.

v. Clarence,⁵⁸ Lord Coleridge, C. J., observed that: "In such a matter as the construction of a statute, if the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils, there is in my opinion good reason for believing that the construction which leads to such results cannot be the true construction of the statute."

A statute declaring in full force all ordinances of a city or other corporation in operation at its date does not embrace one which has been pronounced judicially to be inoperative.⁵⁹ An act validating certain sales made by persons in a fiduciary capacity, in the event of any irregularity or defect existing in the judicial appointment or qualification of such trustee, cures only such defects as occur in proceedings of courts which have jurisdiction of the subject-matter. It does not validate a sale made by a trustee who was irregularly and defectively appointed or qualified by a court which had no jurisdiction to make such appointment.⁶⁰ A statute authorizing an officer to convey to the state certain lands held by a county by virtue of tax deeds issued upon sales for delinquent taxes theretofore made, was held not to apply to lands of which the tax deeds were void upon their face.⁶¹

Co. v. Naylor, L. R. 9 Q. B. Div. 648; Sturges v. Crowninshield, 4 Wheat. 202, 4 L. Ed. 529; Plumstead Board of Works v. Spackman, L. R. 13 Q. B. Div. 878; Mayor, etc. v. Moore, 6 H. & J. 381; Buckner v. Real Estate Bank, 5 Ark. 536, 41 Am. Dec. 105; Thayer v. Dudley, 3 Mass. 296; Holbrook v. Holbrook, 1 Pick. 248, 254; Mendon v. County of Worcester, 10 Pick. 235; Eaton v. Green, 22 id. 526, 532; Holbrook v. Bliss, 9 Allen, 69, 75; Commonwealth v. Munson, 127 Mass. 459, 34 Am. Rep. 411; Kerlin v. Bull, 1 Dall. (Pa.) 175, 178; Jersey Co. v. Davison, 29 N. J. L. 415; State v. Slover, 126 Mo. 652, 29

S. W. 718; Lamar Water & E. L. Co. v. Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 757, 32 L. R. A. 157; Washington & Idaho R. R. Co. v. Coeur d'Alene Ry. & Nav. Co., 160 U. S. 77, 16 S. C. Rep. 231, 40 L. Ed. 346.

⁵⁸ L. R. 22 Q. B. 23, 65.

⁵⁹ Allen v. Savannah, 9 Ga. 286; Bridge v. Branch, L. R. 1 C. P. Div. 633.

⁶⁰ Halderman v. Young, 107 Pa. St. 324.

⁶¹ Easley v. Whipple, 57 Wis. 485, 14 N. W. 904; Haseltine v. Hewitt, 61 Wis. 121, 21 N. W. 299, 302.

This conclusion was adhered to, though it was shown that there were no lands to which the statute could apply.⁶²

§ 489 (323). A construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither, or not in so great a degree, unless the terms of the instrument absolutely require such preference. Of two constructions, either of which is warranted by the words of the amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended.⁶³ A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention.⁶⁴ "When the literal enforcement of a statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurd and which the legislature could not have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity."⁶⁵

§ 490 (324). Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience, and to oppose all prejudice to public interests.⁶⁶ "In constru-

⁶² Id.; *Bush v. District of Columbia*, 1 App. Cas. (D. C.) 1; *Brewster v. Woolridge*, 100 Ga. 305, 28 S. E. 43.

⁶³ *Griffin's Case*, Chase's Dec. 364.

⁶⁴ *Walton*, Ex parte, L. R. 17 Ch. Div. 746.

⁶⁵ *People v. Chicago*, 152 Ill. 546, 552, 38 N. E. 744.

⁶⁶ *Wassell v. Tunnah*, 25 Ark. 101; *San Diego v. Grannis*, 77 Cal. 511, 19 Pac. 875; *Jacobs v. Board of Supervisors*, 100 Cal. 121, 34 Pac. 630; *People v. Craycroft*, 111 Cal. 544,

44 Pac. 463; *Carpy v. Dowdell*, 129 Cal. 244, 61 Pac. 1126; *Brown's Appeal*, 72 Conn. 148, 44 Atl. 22, 49 L. R. A. 144; *Brown County v. Aberdeen*, 4 Dak. 402, 31 N. W. 735; *Bush v. District of Columbia*, 1 App. Cas. (D. C.) 1; *Brewster v. Woolridge*, 100 Ga. 305, 28 S. E. 43; *Spinks v. Rome Guano Co.*, 108 Ga. 614, 33 S. E. 906; *People v. Chicago*, 152 Ill. 546, 38 N. E. 744; *Illinois Cent. R. R. Co. v. Chicago*, 173 Ill. 471, 482, 50 N. E. 1104; *Canal Commissioners v. Sanitary District*, 184

ing an act of the general assembly, such a construction will be placed upon it as will tend to advance the beneficial purposes manifestly within the contemplation of the general assembly at the time of its passage; and courts will hesitate to place such a construction upon its terms as will lead to

- Ill. 597, 56 N. E. 953; *People v. Harrison*, 191 Ill. 257, 61 N. E. 99; *Harrison v. People*, 92 Ill. App. 643; *Iuka v. Schlosser*, 97 Ill. App. 232; *State v. Sears*, 115 Iowa, 28, 87 N. W. 735; *Brenner v. Kansas Mut. Life Ass'n*, 6 Kan. App. 152, 51 Pac. 303; *Samuels v. Commonwealth*, 10 Bush, 491; *Commonwealth v. Holliday*, 98 Ky, 616, 83 S. W. 948; *Mayor v. Root*, 8 Md. 95; *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Opinion of Justices*, 7 Mass. 523; *Gibson v. Jenney*, 15 Mass. 205; *People v. Burns*, 5 Mich. 114; *Van Fleet v. Van Fleet*, 49 Mich. 610, 14 N. W. 566; *Coy v. Coy*, 15 Minn. 119; *State v. Rollins*, 80 Minn. 216, 83 N. W. 151; *Neenan v. Smith*, 50 Mo. 525; *State v. Jones*, 102 Mo. 305, 14 S. W. 946, 15 S. W. 556; *Lamar Water & El. L. Co. v. Lamar*, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 757, 32 L. R. A. 157; *State v. Slover*, 126 Mo. 652, 29 S. W. 718; *German Am. Bank v. Carondelet Real Est. Co.*, 150 Mo. 570, 51 S. W. 691; *State v. Wood*, 155 Mo. 425, 56 S. W. 464; *State v. Garrett*, 76 Mo. App. 295; *Heman v. McNamara*, 77 Mo. App. 1; *Scarrett v. County Court*, 89 Mo. App. 585; *Jersey Co. v. Davison*, 29 N. J. L. 415; *Smith v. People*, 47 N. Y. 330; *People v. Merrick*, 61 Hun, 397, 16 N. Y. S. 246; *Head's Iron Foundry v. Sanders*, 77 Hun, 432, 28 N. Y. S. 808; *Miller v. Maujer*, 82 App. Div. 419, 81 N. Y. S. 575; *Doyle v. Doyle*, 50 Ohio St. 330, 34 N. E. 166; *Stiles v. Guthrie*, 3 Okl. 26, 41 Pac. 388; *Lee v. Roberts*, 3 Okl. 106, 41 Pac. 595; *Kerlin v. Bull*, 1 Dall. (Pa.) 175; *Kelly v. Union*, 5 W. & S. 535; *McCloskey v. McConnell*, 9 Watts, 17; *Stewart v. Keemle*, 4 S. & R. 72; *Buckley v. Eckert*, 3 Pa. St. 268, 45 Am. Dec. 650; *Nichols v. Phelps*, 15 Pa. St. 26; *Welch v. Kline*, 57 Pa. St. 428; *Pittsburg, etc. R. R. Co. v. S. W. Pa. Ry. Co.*, 77 Pa. St. 173; *Swift's Appeal*, 111 Pa. St. 516, 2 Atl. 539; *Duquesne Savings Bank's Appeal*, 96 Pa. St. 298; *In re Wainwright*, 1 Phila. 258; *Davey v. Ruffel*, 3 Pa. Dist. Ct. 75; *Starck v. Insurance Co.*, 7 Pa. Co. Ct. 511; *State v. Drowne*, 20 R. I. 302, 38 Atl. 978; *Carolina Savings Bank v. Evans*, 28 S. C. 521, 6 S. E. 321; *State v. Beaufort*, 39 S. C. 5, 17 S. E. 355; *Wise v. Morgan*, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548; *Rice v. Ashland County*, 108 Wis. 189, 84 N. W. 189; *Lau Ow Bew v. United States*, 144 U. S. 47, 12 S. C. Rep. 517, 36 L. Ed. 340; *Tsoi Sim v. United States*, 116 Fed. 920, 54 C. C. A. 154; *Rex v. Yorkshire*, 1 Doug. 192; *Rex v. Dorsetshire*, 15 East, 200; *Sinnott v. Whitechapel*, 3 C. B. (N. S.) 674; *Patten v. Rhymer*, 3 E. & E. 1; *Whistler v. Foster*, 14 C. B. (N. S.) 248; *Austin v. Bunyard*, 6 B. & S. 687; *Quin v. O'Keeffe*, 10 Ir. C. L. (N. S.) 411; *Stone v. Yeovil*, L. R. 1 C. P. Div. 691; *Gatty v. Fry*, L. R. 2 Ex. Div. 265; *Curtis v. Stovin*, L. R. 22

manifestly absurd consequences, and impute to the general assembly total ignorance of the subject with which it undertook to deal.”⁶⁷

The consideration of evil and hardship may properly exert an influence in giving a construction to a statute when its language is ambiguous or uncertain and doubtful, but not when it is plain and explicit.⁶⁸ The same may be said of the consideration of convenience, and in fact of any consequences. If the intention is expressed so plainly as to exclude all controversy, and is one not controlled or affected by any provision of the constitution, it is the law, and courts have no concern with the effects and consequences; their simple duty is to execute it.⁶⁹ The argument of inconvenience is very strong when the statute is ambiguous and fairly open to two constructions. Then the argument of inconvenience, like the argument of absurdity, may be used with great force; but when the construction is clear beyond controversy, it is no answer to say that there are some consequences which will cause inconvenience which were probably not contemplated by the framers.⁷⁰ The master of the rolls said: “With regard to inconvenience I think that is a most dangerous doctrine. I agree if the inconvenience is not only great but what I may call absurd inconvenience, by reading an act in its ordinary sense, whereas if you read it in a manner in which it is capable of being read, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you

Q. B. D. 513; *Hornsey Local Board v. Monarch Invest. Bldg. Soc.*, L. R. 24 Q. B. D. 1.

⁶⁷ *Brewster v. Woolridge*, 100 Ga. 305, 307, 28 S. E. 43. “While it is not within the judicial power, by construction, to cure defects which may render laws unjust or even oppressive, if they clearly exist, yet no statute should be so construed as to render it unreasonable or unjust in its operation, if there

be room for construction at all.” *Bush v. District of Columbia*, 1 App. Cas. (D. C.) 1.

⁶⁸ *Collins v. Carman*, 5 Md. 503; *Johnson v. Railroad Co.*, 49 N. Y. 456.

⁶⁹ *Blake v. Heyward*, Bailey Eq. 208; *Learned v. Corley*, 43 Miss. 687. See *Dudley v. Reynolds*, 1 Kan. 285.

⁷⁰ *In re Alma Spinning Co.*, L. R. 16 Ch. Div. 686.

should not read it according to its ordinary grammatical meaning.”⁷¹ The same has been said of listening to hardship.⁷² Such arguments are applicable only to considerations of convenience and hardship which generally spring from a particular construction, not such as may occur in an individual or exceptional case.⁷³ An act should be so construed as to bring it, if possible, within the legislative authority;⁷⁴ to limit its general words to the subject-matter or object of the act; as including, justifying or requiring lawful acts and regular proceedings. All acts will be construed if possible so as to be valid and effective.⁷⁵ When the alternative is presented of attributing to an enactment a rational purpose and effect, or of regarding it as a dead letter on the statute book, the court will exercise great ingenuity in the endeavor to avoid the latter contingency.⁷⁶

§ 491 (325). *Expressio unius est exclusio alterius*.—This maxim, like all rules of construction, is applicable under certain conditions to determine the intention of the law-maker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusions; but otherwise the expression of one or more things is not a negation or exclusion of other things. What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provisions in the particular act. The maxim is applicable to a statutory provision which grants originally a power or right. In such cases the power

⁷¹ *Reg. v. Tonbridge Overseers*, L. R. 13 Q. B. Div. 342; *Rex v. Poor Law Com'rs*, 6 Ad. & E. 1, 7. See *Rex v. Ramsgate*, 6 B. & C. 712, 715; *Rex v. Barham*, 8 B. & C. 99; *Lamond v. Eiffe*, 3 Q. B. 910; *Everett v. Wells*, 2 Scott, N. R. 531; *Newell v. People*, 7 N. Y. 97; *Bidwell v. Whitaker*, 1 Mich. 469, 479.

⁷² *Munro v. Butt*, 8 E. & B. 754.

⁷³ *Endl. on St.*, § 263.

⁷⁴ *Farnum v. Blackstone Canal Corp.*, 1 Sumn. 46; *Sage v. Brook-*

lyn, 89 N. Y. 189; *People v. McClave*, 99 N. Y. 83.

⁷⁵ *Waukegan v. Foote*, 91 Ill. App. 588; *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937; *State v. Mason*, 153 Mo. 23, 54 S. W. 524; *Slocum v. Neptune*, 68 N. J. L. 595; *Territory v. Ashenfelter*, 4 N. M. 93, 12 Pac. 879; *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

⁷⁶ *Edwards v. Denver & R. G. R. Co.*, 13 Colo. 59, 21 Pac. 1011.

or right originates with the statute, and exists only to the extent plainly granted; the right while inchoate, and the power so far as not exercised, cease, if the statute be repealed, and if the statute provides the mode in which they shall be exercised, that mode must be pursued and no other. This conclusion is almost self-evident; for since the statute creates and regulates, there is no ground for claiming or proceeding except according to it.⁷⁷ In other words, where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and the party is confined to that remedy.⁷⁸ "The rule is certain," said Lord Mansfield, "that where a statute creates a new offense, by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense (not antecedently unlawful), by a particular sanction and particular method of proceeding, that particular method must be pursued and no other."⁷⁹ Where a statute

⁷⁷ *Guerard v. Polhill*, R. M. Charl. 237; *post*, § 493.

⁷⁸ 1 Com. Dig. 44-48; *Foster's Case*, 11 Rep. 56b, 64; 9 Bac. Abr. 259, 260; *Rex v. Robinson*, 2 Burr. 803; *Bailey v. Bryan*, 3 Jones (N. C.), 357, 67 Am. Dec. 246; *Lang v. Scott*, 1 Blackf. 405; *Camden v. Allen*, 26 N. J. L. 398; *Almy v. Harris*, 5 John. 175; *Gedney v. Tewksbury*, 3 Mass. 307; *Smith v. Drew*, 5 id. 514; *Dudley v. Mayhew*, 3 N. Y. 9; *Wiley v. Yale*, 1 Met. 553; *Crosby v. Bennett*, 7 id. 17; *Smith v. Lockwood*, 13 Barb. 209; *Thurston v. Prentiss*, 1 Mich. 193; *Conwell v. Hagerstown Canal Co.*, 2 Ind. 588; *McCormack v. Terre Haute, etc. R. R. Co.*, 9 Ind. 283; *Countess of Rothes v. Kirkcaldy Water-works Com'rs*, L. R. 7 Ap. Cas. 706; *New Haven v. Whitney*, 36 Conn. 373; *Smith v. Stevens*, 10 Wall. 321, 19 L. Ed. 933; *Dist. T'p of Dubuque v. Dubuque*, 7 Iowa,

262; *Cole v. Muscatine*, 14 Iowa, 296; *Hodges v. Tama County*, 91 Iowa, 578, 60 N. W. 185; *Harrington v. Glidden*, 179 Mass. 486, 61 N. E. 54; *Abel v. Minneapolis*, 68 Minn. 89, 70 N. W. 851; *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401; *Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937, 20 Am. St. Rep. 760, 10 L. R. A. 393; *Multnomah County v. Kelly*, 37 Ore. 1, 60 Pac. 202; *Madden v. Lancaster County*, 65 Fed. 188, 12 C. C. A. 566, 27 U. S. App. 528.

⁷⁹ *Rex v. Robinson*, 2 Burr. at p. 803; *Castle's Case*, Cro. Jac. 644; *Stephens v. Watson*, 1 Salk. 45; *Sturgeon v. State*, 1 Blackf. 39; 1 W. Saund. 135, note 4; *Id.* 250, note 3; *State v. Loftin*, 2 Dev. & Bat. 31; *State v. Corwin*, 4 Mo. 609; *Camden v. Allen*, 26 N. J. L. 398; *Smith v. Lockwood*, 13 Barb. 209; *New Albany, etc. R. R. Co. v. Connelly*, 7 Ind. 32; *Victory v. Fitzpatrick*, 8

authorizes a public work, and points out a mode in which parties injured thereby may obtain compensation, that remedy is exclusive;⁸⁰ and the scope of the remedy or points of compensation are confined to the statutory limits.⁸¹ In Arkansas the whole subject of interest, so far as regards contracts for the payment of money, express or implied, was regulated by statute, and it was held these provisions excluded its allowance in other cases than those enumerated.⁸² A statute prohibited the sale without license of certain specified liquors, and this specification excluded all others from the prohibition, so that they were unaffected by the requirement to obtain license.⁸³ When a statute, defining an offense, designates one class of persons as subject to its penalties, all other persons are deemed to be exempted.⁸⁴ As a general rule the exclusion of one subject or thing in a statute is the inclusion of all other things.⁸⁵ Therefore the exclusion of the power of the court to impose a fine of less than \$100, by implication gives the power to impose a fine of more than that sum.⁸⁶ A grant contained several restrictions; a subsequent statute repeated the grant in general terms and repealed all inconsistent acts, with a saving clause including one of the restrictions; it was held that all the other restrictions were repealed.⁸⁷ A general statute provided a general saving of rights, penalties and duties. An independent statute provided penalties for selling intoxicating liquors. This act was subsequently repealed with a

id. 281; *United States v. Dickey*, Morris (Iowa), 412.

⁸⁰ *Calking v. Baldwin*, 4 Wend. 667; *Abel v. Minneapolis*, 68 Minn. 89, 70 N. W. 851; 2 *Lewis' Em. Dom.*, § 624.

⁸¹ *Countess of Rothes v. Kirkcaldy Water-works Com'rs*, L. R. 7 Ap. Cas. 706.

⁸² *Watkins v. Wassell*, 20 Ark. 410, 420.

⁸³ *Feldman v. Morrison*, 1 Ill. App. 460.

⁸⁴ *Howell v. Stewart*, 54 Mo. 400; *Jaques v. Golightly*, 2 W. Bl. 1073; *State v. Jaeger*, 63 Mo. 403, 409.

⁸⁵ *Congdon v. Cook*, 55 Minn. 1, 56 N. W. 253.

⁸⁶ *Hankins v. People*, 106 Ill. 628; *Drake v. State*, 5 Tex. App. 649; *Chiles v. State*, 2 id. 37. See *Stimpson v. Pond*, 2 Curtis, 502, Fed. Cas. No. 13,455.

⁸⁷ *McRoberts v. Washburne*, 10 Minn. 23.

special saving of pending actions. This saving was held to be governed by the maxim under consideration. Doubtless an absolute repeal without any express saving would have let in the general saving, but the repeal being qualified by a provision in the repealing act, which was narrower than the general saving, and which could have no effect unless it was an exclusive effect, it showed the intention of the legislature to exclude any other saving.⁸⁸ It is moreover within this cognate principle, that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it.⁸⁹ Accordingly where a legislative act contained two sets of provisions, one giving specific and precise directions to do a particular thing, and the other in general terms prohibiting certain acts, which would, in the general sense of the words used, include the particular act before authorized, then the general clause does not control or affect the specific enactment.⁹⁰ Every part of a statute must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each. It is not presumed that the legislature intended any part of a statute to be without meaning.⁹¹ An act which extended *one* of the previous penal regulations for the government of moneyed corporations to the free banks, making it a misdemeanor for them to issue bills or notes on time or interest, was in truth a legislative assertion, binding on the judiciary, that such regulation did not previously apply, and that none, except the particular one so expressly selected, should thereafter apply, to the free banks.⁹²

§ 492 (326). Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded.

⁸⁸ *State v. Showers*, 34 Kan. 269, 8 Pac. 474.

⁸⁹ *Felt v. Felt*, 19 Wis. 208.

⁹⁰ *State v. Trenton*, 38 N. J. L. 64.

⁹¹ *Id.*; *McCartee v. Orphan Asylum*, 9 Cow. 437, 18 Am. Dec. 516; *ante*, § 392.

⁹² *Curtis v. Leavitt*, 17 Barb. 309.

Such affirmative legislation, and any other which introduces a new rule, implies a negative.⁹³ It was required by a statute that "all sales by any sheriff or other officer, by virtue of any execution or other process, shall be made at the court-house of the county, except when personal property too cumbersome to be removed shall be levied on, . . . and, also, except where cattle, hogs, sheep or stock, other than horses and mules, are levied on." These exceptions were held to exclude others, and therefore to render the statute imperative and mandatory.⁹⁴ A provision in a statute that a failure to give a specified notice shall not invalidate an election does not, however, imply that all the other requirements must be complied with as mandatory conditions.⁹⁵ Where a condemnation statute requires certain things to be stated in the petition and certain things to appear of record, other things by implication need not be stated or appear.⁹⁶ A statute forbade a common carrier to limit his liability "by any stipulation or limitation expressed in the receipt given for such property." This was held not to forbid a limitation of liability by express contract in other ways.⁹⁷ Where a ballot law pointed out a specific mode by which names not on the ballot could be voted for, all other ways of so voting were held to be excluded.⁹⁸ An act purported by its title to authorize the condemnation of property for streets, avenues or alleys, or for water mains or sewers. It was held not sufficient to cover a provision for condemning property for reservoirs; that the expression of water mains excluded reservoirs.⁹⁹ Where a statute ex-

⁹³ *Smith v. Stevens*, 10 Wall. 823, 19 L. Ed. 933; *New Haven v. Whitney*, 36 Conn. 373; *District T'p of Dubuque v. Dubuque*, 7 Iowa, 262; *Childs v. Smith*, 55 Barb. 45; *Rogers v. Kennard*, 54 Tex. 30; *Rich v. Rayle*, 2 Humph. 404. See *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284.

⁹⁴ *Koch v. Bridges*, 45 Miss. 247.

⁹⁵ *Taylor v. Taylor*, 10 Minn. 107.

⁹⁶ *Sneed v. Falls County*, 91 Tex. 168, 41 S. W. 481.

⁹⁷ *Chicago & N. W. Ry. Co. v. Chapman*, 133 Ill. 96, 24 N. E. 417, 23 Am. St. Rep. 587, 8 L. R. A. 508.

⁹⁸ *McCowin's Appeal*, 165 Pa. St. 233, 30 Atl. 955.

⁹⁹ *Adams v. San Angelo W. W. Co.*, 86 Tex. 485, 25 S. W. 605.

pressly authorizes suit for specified license taxes an action will not lie for other license taxes.¹ A statute required all marriages to be under a license and to be solemnized in a prescribed manner, but also provided that marriages solemnized in a specified manner, without a license, should not be void. It was held that all marriages solemnized or entered into in any other manner without a license were void.²

§ 493 (327). Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others; there is then a natural inference that its application is not intended to be general.³ Thus, where a statute enumerates the cases in which a married woman may sue, she is limited to those cases.⁴ An act providing for levying the poor rate specified coal mines only, and it was therefore held that no other mines were ratable.⁵ An act allowed a house and land to be joined together for the purpose of conferring a qualification; it was held that two different buildings could not be joined for the same purpose.⁶ The enumeration of powers granted to national banks in the eighth section of the national bank act is exclusive; being granted the power to loan money on *personal* security, such banks are precluded from loaning on real-estate mortgages; and mortgages to such banks to secure prior loans being

¹ *State v. Piazza*, 66 Miss. 426, 6 So. 316.

² *Offield v. Davis*, 100 Va. 250, 40 S. E. 910; *In re Estate of McLaughlin*, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699. The following are additional cases in which the maxim *expressio unius est exclusio alterius*, was applied. *Stewart v. State*, 98 Ga. 202, 25 S. E. 424; *Wilson v. Sanitary Trustees*, 133 Ill. 443, 27 N. E. 203; *People v. Hutchinson*, 172 Ill. 486, 50 N. E. 599; *St. Paul v. Johnson*, 69 Minn. 184, 72 N. W. 64; *State v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; *In re*

Varnum, 70 Vt. 147, 40 Atl. 43; *United States v. Sweeny*, 157 U. S. 281, 15 S. E. Rep. 608, 39 L. Ed. 702; *Foley-Bean Lumber Co. v. Sawyer*, 76 Minn. 118, 78 N. W. 1038; *Louisville Water Co. v. Clark*, 143 U. S. 1, 12 S. C. Rep. 346, 36 L. Ed. 55.

³ *Johnson v. Southern Pac. Co.*, 117 Fed. 462, 466, 54 C. C. A. 681; *Wilb. on St.* 190.

⁴ *Miller v. Miller*, 44 Pa. St. 170, 172.

⁵ *Reg. v. Seale*, 5 E. & B. 1.

⁶ *Dewhurst v. Feilden*, 7 M. & G. 182.

expressly permitted, it was held that none given to secure future loans are valid.⁷ When a statute specifies the effects of a certain provision, courts will presume that all the effects intended by the law-maker are stated.⁸ Where an act expressly repeals a specified portion of another act, it follows that, in the judgment of the legislature, no further repeal was necessary.⁹ The repeal of one clause of a section raises a clear implication that nothing else was intended.¹⁰ This application of the rule is not very important, for an implied repeal may result from an irreconcilable contradiction, or from other evidence of an intent to extend the repeal or a saving from a general repeal.¹¹ When a revisory act prescribes its operation upon a previous act, it will have no other effect.¹² A court of a justice of the peace, or other magistrate having only such jurisdiction as is granted by statute, and whose procedure is regulated thereby, has only such jurisdiction as is granted expressly or by necessary implication.¹³ And those particulars of procedure which the statutes regulate are to be substantially followed, and no others are essential.¹⁴ The appellate jurisdiction of the federal supreme court is conferred by the constitution "with such exceptions and under such regulations as congress may make;" therefore, acts of congress affirming such jurisdiction have always been construed as excepting from it all

⁷ *Fowler v. Scully*, 72 Pa. St. 456, 461, 13 Am. Rep. 609. This construction is not disapproved, but only the government can raise the objection to the practice of the bank. *Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Nat. Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 561.

⁸ *Perkins v. Thornburgh*, 10 Cal. 189, 191.

⁹ *Pursell v. New York Life Ins. etc. Co.*, 42 N. Y. Super. Ct. 383, 397.

¹⁰ *State v. Morrow*, 26 Mo. 131,

141; *Crosby v. Patch*, 18 Cal. 438; *Sales v. Barber Asphalt Pav. Co.*, 166 Mo. 671, 66 S. W. 979.

¹¹ *Burnham v. Onderdonk*, 41 N. Y. 425.

¹² *Patterson v. Tatum*, 3 Sawyer, 164, Fed. Cas. No. 10,830.

¹³ *Wight v. Warner*, 1 Doug. (Mich.) 384; *Beach v. Botsford*, id. 199, 40 Am. Dec. 45; *Clark v. Holmes*, 1 Doug. (Mich.) 390; *Reynolds v. Orvis*, 7 Cow. 269.

¹⁴ *Ham v. Steamboat Hamburg*, 2 Iowa, 460; *Scovern v. State*, 6 Ohio St. 288.

cases not expressly described and provided for. Hence, when congress enacts that that court shall have appellate jurisdiction over final decisions of the circuit courts in certain cases, the act is held to operate as a negative or exception of such jurisdiction in other cases; and the repeal of the act necessarily negatives jurisdiction under it of those cases also.¹⁵

§ 494 (328). An express exception, exemption or saving excludes others.¹⁶ Where a general rule has been established by statute with exceptions the court will not curtail the former nor add to the latter by implication.¹⁷ Exceptions strengthen the force of a general law, and enumeration weakens it as to things not expressed.¹⁸ Power of eminent domain was granted to a railroad company to enter on land and appropriate as much of it, "except timber," as might be necessary for its purposes. "Why an exception," asked Gibson, C. J., "if the word 'land' was not supposed to embrace everything else? The expression of one thing is the exclusion of another; and consequently no further exception was intended."¹⁹ A statute declared that "all offices, posts of profit, professions, trades and occupations, except the occupation of farmers," "shall be valued and assessed and subject to taxation;" it was held that the exception of farmers excluded any other, and that the calling of a minister of the gospel was a "profession" and taxable.²⁰ Certain exemptions from distress for taxes being expressed in a statute, by fair implication all other property is liable.²¹ When by a declaratory provision the legislature enact that a thing may be done which before that time was lawful,

¹⁵ *McCardle, Ex parte*, 7 Wall. 506, v. *Kirkcaldy Water-works Com'rs*, 19 L. Ed. 264. See *Yerger, Ex parte*, 8 Wall. 85, 19 L. Ed. 332. L. R. 7 Ap. 706.

¹⁶ See *Reg. v. Mallow Union*, 12 Ir. 14 Pa. St. 241, 243, 53 Am. Dec. 534. C. L. (N. S.) 40.

¹⁷ *Roberts v. Yarboro*, 41 Tex. 452; 226, 229. ¹⁹ *Brocket v. Ohio, etc. R. R. Co.*, 14 Pa. St. 241, 243, 53 Am. Dec. 534.

¹⁸ *Wallace v. Stevens*, 74 id. 559. ²⁰ *Miller v. Kirkpatrick*, 29 Pa. St. 226, 229. ²¹ *Sherwin v. Bugbee*, 16 Vt. 439, 445.

¹⁹ *Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272; *Countess of Rothes*

and adds a proviso that nothing therein shall be so construed as to permit some matter embraced in the general provision to be done, this is an implied prohibition of such act, though before that time it was lawful.²² The exception of certain things does not always show that all others are included. An act of congress forbidding the importation of foreigners under contract to perform labor or services of any kind excepted professional actors, artists, lecturers, singers and domestic servants. Notwithstanding this express exception, it was held that a clergyman was not within the act.²³

§ 495 (329). The maxim does not apply to a statute the language of which may fairly comprehend many different cases, in which some only are expressly mentioned by way of example merely, and not as excluding others of a similar nature. So where the words used by the legislature are general and the statute is only declaratory of the common law, it will extend to other persons and things besides those actually named.²⁴ If there is some special reason for mentioning one, and none for mentioning a second which is otherwise within the statute, the absence of any mention of the latter will not exclude it.²⁵ The specification in the statute that either of certain acts shall be taken as an appearance does not exclude other methods of appearing which have that effect on general principles of the common law.²⁶ The mention of one thing is not exclusive when the context shows a different intention.²⁷ The enactment of a law does not raise a presumption that it did not exist before.²⁸ If it be an explicit provision on a given subject it does not of itself prove that the law was different before; it may have

²² *State v. Eskridge*, 1 Swan, 413.

²³ *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 S. C. Rep. 511, 36 L. Ed. 226.

²⁴ *Broom's Max.* 664; *Scaggs v. Baltimore, etc. R. R. Co.*, 10 Md. 268.

²⁵ *Brown v. Buzan*, 24 Ind. 194; *Parks v. Soldiers' & Sailors' Home*, 22 Colo. 86, 43 Pac. 542.

²⁶ *Curtis v. McCullough*, 3 Nev. 202.

²⁷ *Mayor v. Davis*, 6 Watts & S. 269, 278-79; *Cocciola v. Wood-Dickerson Supply Co.*, 136 Ala. 532, 33 So. 856; *Manion v. Ohio Valley Ry. Co.*, 99 Ky. 504, 36 S. W. 530; *Grubbe v. Grubbe*, 26 Ore. 363, 38 Pac. 182.

²⁸ *Nunnally v. White*, 3 Met. (Ky.) 584.

been made in affirmance of the existing law and to remove doubts.²⁹ In *Grubbe v. Grubbe*,³⁰ it is said that the maxim *expressio unius est exclusio alterius* is not of universal application and that great caution should be exercised in its use.

§ 496 (330). **Presumptions.**—A legal presumption is sometimes conclusive; then no argument or consideration can be adduced to overturn it. Other presumptions are rebuttable, and good only until overthrown. A presumption therefore rests upon a matter treated as absolutely true by expedient assumption, or as probably true. The former is taken to be true because there is the highest and best evidence of it, and it is for the public convenience and security that its verity should be absolutely assumed. Other matters are presumptively true, but open to question; so that whoever claims contrary to it has the burden of argument, as against a presumption of fact he would have the burden of proof. A statute properly authenticated in the proper office is conclusively presumed to be duly enacted,³¹ except where by the fundamental law a question may be raised on extraneous evidence;³² that it is enacted from good motives, and no issue to the contrary is permitted.³³ No issue of fact will be tried as to the motives of legislators voting for a law, nor to impeach it on the grounds of fraud or corruption, either at the suit of a private person or the state.³⁴

²⁹ *Montville v. Haughton*, 7 Conn. 543.

³⁰ 26 Ore. 363, 370, 38 Pac. 182.

³¹ *Kilgore v. Magee*, 85 Pa. St. 401; *Gildewell v. Martin*, 51 Ark. 559, 11 S. W. 882; *State v. Algood*, 87 Tenn. 163, 10 S. W. 310; *Territory v. O'Connor*, 41 N. W. 746; *State v. Robertson*, 41 Kan. 200, 21 Pac. 382; *People v. Dunn*, 80 Cal. 211.

³² *Ante*, §§ 29-44; *People v. McElroy*, 72 Mich. 446, 40 N. W. 750.

³³ *Wright v. Defrees*, 8 Ind. 298; *People v. Shepard*, 36 N. Y. 285; *Newman*, *Ex parte*, 9 Cal. 502.

³⁴ *McCulloch v. State*, 11 Ind. 424, 430-31; *Fletcher v. Peck*, 6 Cr. 87, 3 L. Ed. 162; *Ex parte McCardle*, 7 Wall. 506, 19 L. Ed. 264; *Flint, etc. Co. v. Woodhull*, 25 Mich. 99, 12 Am. Rep. 233; *Kountze v. Omaha*, 5 Dill. 443, Fed. Cas. No. 7928; *State v. Hays*, 49 Mo. 604; *People v. Bigler*, 5 Cal. 23; *Ex parte Newman*, 9 id. 502; *Harpending v. Haight*, 39 id. 189, 2 Am. Rep. 432; *Slack v. Jacob*, 8 W. Va. 612; *Mayor, etc. v. State*, 15 Md. 376; *Johnson v. Higgins*, 3 Metc. (Ky.) 566; *People v. Draper*, 15 N. Y. 532; *State v. Fagan*,

Nor is the policy, moral justice or expediency of a statute to be considered by the judiciary in determining its validity.³⁵

§ 497 (331). It is not to be presumed that the legislature have assumed the existence of a fact upon which an act of legislation is based, without evidence. On the contrary, courts are bound to presume that they acted upon good and sufficient evidence, and that presumption is conclusive on the question of the validity of the act.³⁶ It was so held on an objection to the validity of an act organizing a new county, that it did not contain the population required by the constitution.³⁷ The legislature is presumed to act with a full knowledge of all facts upon which their legislation is based or to which it is to be applied.³⁸ It is presumed, as well on the ground of good faith as on the ground that the legislature would not do a vain thing, that it intends its acts and every part of them to be valid and capable of being carried into effect. If a statute, however, is unconstitutional it is void, and the courts have power to treat it as a nullity, and will do so, or such parts as are in contravention of the fundamental law.³⁹ But until it is shown to be plainly and manifestly in conflict with the constitution the presumption of its validity will hold good; all doubts will be resolved in its favor. Every presumption is in favor of the validity of legislative acts, and they are to be upheld unless there is a substantial departure from the organic law.⁴⁰ Where there is not in the law an express limitation to the power to do a

22 La. Ann. 545; *State v. Cordoza*, 5 S. C. 297; *Humboldt Co. v. Churchill Co.*, 6 Nev. 30; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *Wright v. Defrees*, 8 Ind. 298; *Sunbury, etc. R. Co. v. Cooper*, 33 Pa. St. 278.

³⁵ *Brewer v. Blougher*, 14 Pet. 198, 10 L. Ed. 408. See *Richardson v. Crandall*, 48 N. Y. 356; *ante*, § 85.

³⁶ *Ante*, § 79.

³⁷ *De Camp v. Eveland*, 19 Barb.

81; *Farmers', etc. Co. v. Chicago, etc. R. R. Co.*, 39 Fed. 143.

³⁸ *Erschine v. Nelson County*, 4 N. D. 66, 58 N. W. 348, 27 L. R. A. 696; *Chesapeake & P. Tel. Co. v. Manning*, 186 U. S. 238, 22 S. C. Rep. 881, 46 L. Ed. 1144.

³⁹ *Winter v. Jones*, 10 Ga. 190.

⁴⁰ *People v. Briggs*, 50 N. Y. 553; *Winter v. Montgomery*, 65 Ala. 403; *Slack v. Jacob*, 8 W. Va. 626; *Galveston, etc. R. R. Co. v. Gross*, 47

certain thing, an inference cannot be made or sustained which will defeat the object of the law.⁴¹ "Before determining," said Lumpkin, J., "that the constitution has been plainly and palpably infringed, incautiously or otherwise, by a co-ordinate branch of the government, the best energies of our minds should be employed in putting such construction upon it as to uphold it, if possible, and carry it into effect, *ut res magis valeat quam pereat*."⁴²

§ 498 (332). It is a cardinal rule that all statutes are to be so construed as to sustain rather than ignore or defeat them; to give them operation, if the language will permit, instead of treating them as meaningless: *ut res magis valeat, quam pereat*.⁴³ Whenever an act can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, this will be done.⁴⁴ Where one construction will make a statute void for conflict with the constitution, and another would render it valid, the latter will be

Tex. 428; *State v. Sorrells*, 15 Ark. 664; *Griffin, In re*, 25 Tex. (Supl't) 623; *Commissioners v. Ballard*, 69 N. C. 18; *Edwards v. Williamson*, 70 Ala. 145; *Quartebaum v. State*, 79 id. 1; *South & North Ala. R. R. Co. v. Morris*, 65 Ala. 193; *People v. Bull*, 46 N. Y. 68, 7 Am. Rep. 302; *Sadler v. Langham*, 34 Ala. 311; *State v. Dombaugh*, 20 Ohio St. 173; *Zeigler v. South, etc. R. R. Co.*, 58 Ala. 594; *Commonwealth v. Hitchings*, 5 Gray, 485; *Newsom v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686; *People v. Comstock*, 78 N. Y. 356; *Louisville, etc. R. R. Co. v. County Ct.*, 1 Sneed, 637, 62 Am. Dec. 424; *Cline v. Greenwood*, 10 Ore. 230; *Opinion of Justices*, 23 Pick. at p. 573; *Bailey v. Commonwealth*, 11 Bush, at p. 691; *Cutts v. Hardee*, 38 Ga. 350; *People v. San Francisco, etc. R. R. Co.*, 35 Cal. 606; *Commissioners v. Silvers*, 22 Ind.

491; *Morrison v. Springer*, 15 Iowa, 304; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Inkster v. Carver*, 16 Mich. 484; *State v. Cooper*, 5 Blackf. 258; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *State v. Robinson*, 1 Kan. 17; *Brown v. Buzan*, 24 Ind. 194; *Tyler v. People*, 8 Mich. 320; *Mayor, etc. v. State*, 15 Md. 376; *Rich v. Flanders*, 39 N. H. 304; *Speer v. School Directors*, 50 Pa. St. 150; *Neal v. Roberts*, 1 Dev. & Batt. L. 81; *Dearing v. York, etc. R. R. Co.*, 31 Me. 172; *ante*, § 82.

⁴¹ *Cook v. Com'rs*, 6 McLean, 112, Fed. Cas. No. 3157.

⁴² *Winter v. Jones*, 10 Ga. 190.

⁴³ *Howard Association's Appeal*, 70 Pa. St. 344.

⁴⁴ *Newland v. Marsh*, 19 Ill. 376; *Roosevelt v. Godard*, 52 Barb. 533; *Colwell v. May, etc. Co.*, 19 N. J. Eq. 245; *ante*, § 83.

adopted though the former at first view is otherwise the more natural interpretation of the language.⁴⁵ Every intendment should be made to favor the constitutionality of a statute. The legislature is presumed to act in view of the constitution and not to intend a violation of its provisions or the enactment of an invalid law.⁴⁶ A provision as to officers' fees should be construed as applying only to future officers rather than that the act should be set aside as infringing a prohibition of any law increasing fees of officers during their term of office.⁴⁷ When the language of a statute is clear and unambiguous, a meaning different from that which the words plainly imply cannot be judicially sanctioned. Even when a court is convinced, from considerations outside of the language of the statute, that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity.⁴⁸ The correct rule of

⁴⁵Slack v. Jacobs, 8 W. Va. 612; Newland v. Marsh, 19 Ill. 384; Bridges v. Shallcross, 6 W. Va. 574; Marshall v. Grimes, 41 Miss. 27; Eyre v. Jacob, 14 Gratt. 422; Commonwealth v. Gaines, 2 Va. Cas. 172; Bull v. Rowe, 13 S. C. 355; Tabor v. Cook, 15 Mich. 322; Grand River B. Co. v. Jarvis, 30 Mich. 308; Robinson v. State, 15 Tex. 311; Roosevelt v. Godard, 52 Barb. 533; Ogden v. Saunders, 12 Wheat. 270, 6 L. Ed. 606; Speer v. School Directors, 50 Pa. St. 150; Brown v. Buzan, 24 Ind. 194; State v. Intoxicating Liquors, 19 Atl. 913; New Orleans v. Salamander Ins. Co., 25 La. Ann. 650; State v. Fields, 2 Bailey, 554; Winter v. Jones, 10 Ga. 190; Read v. Levy, 30 Tex. 738. A law passed when it conflicted with the constitution in force, but in anticipation of

the adoption of a new constitution which had been prepared and was awaiting the vote for its adoption. It, being in accord with the new constitution which was subsequently adopted, was held valid. Galveston, etc. R. R. Co. v. Gross, 47 Tex. 428.

⁴⁶Wells, Fargo & Co.'s Express v. Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371; Hale v. McGettigan, 114 Cal. 112, 45 Pac. 1049; State v. County Commissioners, 87 Minn. 325, 92 N. W. 216; People v. Bremer, 69 App. Div. 14, 74 N. Y. S. 570.

⁴⁷Kerrigan v. Force, 68 N. Y. 381.

⁴⁸Smith v. State, 66 Md. 215, 7 Atl. 49; Woodbury v. Berry, 18 Ohio St. 456; Bradbury v. Wagenhorst, 54 Pa. St. 180.

construction undoubtedly is, that where a law is clearly expressed the court should adhere to the literal expression without regard to consequences; then every construction derived from a consideration of its reason and spirit should be discarded.⁴⁹ It is nevertheless presumed that the legislature do not intend absurdity, inconvenience or injustice. While courts are not at liberty to set aside a statutory provision on this presumption, where the intention is plain and unmistakable, they will presume, when the words are not precise and clear, that some exception or qualification was intended to avoid such consequences; and such construction will be adopted as appears most reasonable and best suited to accomplish the objects of the statute.⁵⁰ It will be presumed that the legislature did not intend to enact an absurd law or one incapable of being intelligently enforced.⁵¹

§ 499 (333). It is presumed that the legislature is acquainted with the law; that it has a knowledge of the state of it upon the subjects upon which it legislates;⁵² that it is informed of previous legislation⁵³ and the construction it has received.⁵⁴ The legislature is also presumed to know the principles of statutory construction.⁵⁵ It necessarily re-

⁴⁹ *Bennett v. Worthington*, 24 Ark. 487; *Sneed v. Commonwealth*, 6 Dana, 338.

⁵⁰ *Commonwealth v. Kimball*, 24 Pick. 366, 370; *Perry County v. Jefferson Co.*, 94 Ill. 214, 220; *United States v. Kirby*, 7 Wall. 486, 19 L. Ed. 278; *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580; *Foley v. Bourg*, 10 La. Ann. 129; *Gilkey v. Cook*, 60 Wis. 133, 18 N. W. 639; *Philadelphia v. Ridge Ave. Ry. Co.*, 102 Pa. St. 190, 196; *Tsoi Sim v. United States*, 116 Fed. 920, 54 C. C. A. 154.

⁵¹ *Bingham v. Birmingham*, 103 Mo. 345, 15 S. W. 533; *State v. Bixman*, 162 Mo. 1, 62 S. W. 828.

⁵² *Reg. v. Watford*, 9 Q. B. at

p. 635; *Jones v. Brown*, 2 Ex. 332; *Phelan v. Johnson*, 7 Ir. L. at p. 535.

⁵³ *Bradbury v. Wagenhorst*, 54 Pa. St. 180, 182; *Tuxbury's Appeal*, 67 Me. 267; *Howard Association's Appeal*, 70 Pa. St. 344; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407; *Anderson v. Winfree*, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

⁵⁴ *O'Byrnes v. State*, 51 Ala. 25, 27; *Banks, Ex parte*, 28 id. 28; *Bloodgood v. Grasey*, 31 id. 575; *State Board v. Holliday*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826.

⁵⁵ *People v. Hinrichsen*, 161 Ill. 223, 43 N. E. 973. In this case the court says: "Knowledge of the

sults from the rules of construction with reference to the common law that the legislature is presumed to be familiar with it.⁵⁶ It has been held that the legislature is presumed to know the existence of the difference between the practice in bankruptcy and the practice in chancery; that the onus is clearly thrown on those who assert the contrary.⁵⁷ It has been suggested that this is more an expedient conclusion than a presumption of fact.⁵⁸ A judicial construction of a statute of long standing has force as a precedent from the presumption that the legislature is aware of it, and its silence a tacit admission that such construction is correct.⁵⁹ The re-enactment of a statute after a judicial construction of its meaning is to be regarded as a legislative adoption of the statute as thus construed.⁶⁰ So, where the terms of a statute which has received a judicial construction are used in a later statute, whether passed by the legislature of the same state or country, or by that of another, that construction is to be given to the later statute;⁶¹ for if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effectuate that intention.⁶²

settled maxims and principles of statutory interpretation is imputed to the legislature. To the end that there may be certainty and uniformity in legal administration, it must be assumed that statutes are enacted with a view to their interpretation according to such maxims and principles. When they are regarded the legislative intent is ascertained." p. 226.

⁵⁶ See *Jones v. Dexter*, 8 Fla. 276, 286.

⁵⁷ *Kellock's Case*, L. R. 3 Ch. at pp. 781, 782.

⁵⁸ *Wilb. on St.* 13.

⁵⁹ *Phelan v. Johnson*, 7 Ir. L. 535.

⁶⁰ *Cota v. Ross*, 66 Me. 161; *Tuxbury's Appeal*, 67 Me. 267.

⁶¹ *Commonwealth v. Hartnett*, 3 Gray, 450.

⁶² *Id.*; 6 Dane Abr. 613; *Kirkpatrick v. Gibson's Ex'r*, 2 Brock. 388; *Pennock v. Dialogue*, 2 Pet. 1, 18, 7 L. Ed. 327; *Adams v. Field*, 21 Vt. 266; *Whitcomb v. Rood*, 20 id. 52; *Rutland v. Mendon*, 1 Pick. 154; *Myrick v. Hasey*, 27 Me. 17, 46 Am. Dec. 583; *The Abbotsford*, 98 U. S. 440, 25 L. Ed. 168; *O'Byrnes v. State*, 51 Ala. 25; *Tomson v. Ward*, 1 N. H. 9; *Mooers v. Bunker*, 29 N. H. 420; *Frink v. Pond*, 46 id. 125; *Hakes v. Peck*, 30 How. Pr. 104; *Bank of Mobile v. Meagher*, 33 Ala. 622; *Re Murphy*, 23 N. J. L. 180; *Matthews, Ex parte*, 52 Ala. 51; *Knight v. Freeholders of Ocean Co.*, 10 Cent.

It is presumed that the legislature does not intend to make any change in the existing law beyond what is expressly declared.⁶³ And this presumption applies to the common law as well as to statutes.⁶⁴ Hence repeals by implication are recognized only when there is an unavoidable contradiction.⁶⁵ And for a like reason statutes in derogation of the common law are strictly construed unless controlled by some other rule of construction.⁶⁶ The presumption is against any radical change of legislative policy.⁶⁷

It is presumed, in the construction of general words or dubious provisions, that there is no intention to depart from any established policy of the law;⁶⁸ to innovate upon fundamental principles;⁶⁹ nor to oust the jurisdiction of the superior courts,⁷⁰ or establish new jurisdictions, especially exclusive jurisdictions.⁷¹ There is also a presumption against any intention to surrender public rights,⁷² or to affect the government.⁷³ The legislature is presumed to intend, ex-

Rep. 653; 49 N. J. L. 485; *State v. Swope*, 7 Ind. 91; *La Selle v. Whitfield*, 12 La. Ann. 81; *Gould v. Wise*, 18 Nev. 253; *McKenzie v. State*, 11 Ark. 594.

⁶³ *Graham v. Van Wyck*, 14 Barb. 531; *State v. Rotwitt*, 17 Mont. 41, 41 Pac. 1004.

⁶⁴ *Murphy v. Preston*, 5 Mackey, 514; *Forrester v. Boston*, etc. Mining Co., 21 Mont. 544, 55 Pac. 229, 353.

⁶⁵ *Ante*, § 247.

⁶⁶ *Post*, § 576.

⁶⁷ *State v. Hickman*, 11 Mont. 541, 29 Pac. 92; *Nashville, C. & St. L. Ry. Co. v. Jones*, 100 Tenn. 512, 45 S. W. 681.

⁶⁸ *Minet v. Leman*, 20 Beav. at p. 278. See *Overseers v. Smith*, 2 S. & R. 363; *Small v. Small*, 18 Atl. 497.

⁶⁹ *Ante*, § 385.

⁷⁰ *Post*, § 576.

⁷¹ *Hersom's Case*, 39 Me. 476; *Cus-*

ter Co. v. Yellowstone Co., 6 Mont. 39, 9 Pac. 586; *Pitman v. Flint*, 10 Pick. 504.

⁷² *State v. Kinne*, 41 N. H. 238; *Jersey City v. Hudson*, 13 N. J. Eq. 420; *Harrison v. Young*, 9 Ga. 359; *Bennett v. The Auditor*, 2 W. Va. 441.

⁷³ *Willion v. Berkley*, 1 Plowd. 236; *Attorney-General v. Donaldson*, 10 M. & W. 117; *Huggins v. Bambridge*, Willes, 241; *Alexander v. State*, 56 Ga. 478; *Rex v. Wright*, 1 Ad. & El. 437; *United States v. Greene*, 4 Mason, 427, Fed. Cas. No. 15,258; *United States v. Hewes*, Crabbe, 307, Fed. Cas. No. 15,359; *United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373; *Jones v. Tatham*, 20 Pa. St. 398; *Cole v. White Co.*, 32 Ark. 45; *Stoughton v. Baker*, 4 Mass. 522; *State v. Milburn*, 9 Gill, 105; *Martin v. State*, 24 Tex. 61; *State v. Garland*, 7 Ired. L. 48;

cept as the statute otherwise provides, that enactments be construed by the common law, and enforced according to its procedure.⁷⁴ When courts are empowered to render judgments or give relief in a particular class of cases as they shall deem just, or according to their discretion, this power is expounded and limited by the principles of the common law; it is legal justice they are to administer, a legal discretion they are to exercise;⁷⁵ so when any special duties are imposed or new jurisdiction granted. "Wherever such discretionary authority," said Woodward, P. J., "is conferred upon them in reference to subjects outside of their peculiar duties, it is always presumed by the legislature that it will be exercised in accordance with judicial usages, and upon uniform and established rules. The safety of the community, as well as the usefulness and independence of the judiciary, absolutely demands that *all* the duties of the court shall be defined either by statute or by practice."⁷⁶ And when a discretionary power is granted to an officer or special tribunal, it is intended and presumed to be a reasonable discretion. As Lord Denman said, "not a wild but a sound discretion, and to be confined within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself."⁷⁷

State v. Kinne, 41 N. H. 238; Green v. United States, 9 Wall. 655, 19 L. Ed. 806.

⁷⁴ Booth v. Kitchen, 7 Hun, 260, 264; Colburn v. Swett, 1 Met. 232; Elder v. Bemis, 2 id. 599; State v. Fletcher, 5 N. H. 257; Gearhart v. Dixon, 1 Pa. St. 224; State v. Parker, 91 N. C. 650; Graffins v. Commonwealth, 3 Pen. & W. 502; Edge v. Commonwealth, 7 Pa. St. 275; Phillips v. Commonwealth, 44 id. 197; Commonwealth v. Reiter, 78 id. 161; Oakland T'p v. Martin, 104 id. 303; Wood Mowing M. Co. v. Caldwell, 54 Ind. 270, 276.

⁷⁵ Ex parte Barnett, L. R. 4 Ch. 351; Stevens v. Ross, 1 Cal. 94; Lash v. Von Neida, 109 Pa. St. 207; Doherty v. Allman, L. R. 3 App. Cas. 709, 728.

⁷⁶ Re Report of County Auditors. 1 Woodw. (Pa.) 270, 272. See Seely v. State, 11 Ohio, 501; 12 id. 496.

⁷⁷ Wilson v. Rastall, 4 T. R. 757; Andrews v. King, 77 Me. 224; Ham v. Board of Police, 142 Mass. 90, 7 N. E. 540; Reg. v. Sykes, L. R. 1 Q. B. Div. 52; Smith, Ex parte, 3 id. 374.

§ 500 (334). **Implications and incidents.**—Statutes are not, and cannot be, framed to express in words their entire meaning. They are framed like other compositions to be interpreted by the common learning of those to whom they are addressed; especially by the common law, in which it becomes at once enveloped, and which interprets its implications and defines its incidental consequences. That which is implied in a statute is as much a part of it as what is expressed.⁷⁸ In case of a newly created felony it must necessarily possess all the incidents which appertain to felony by the rules and principles of the common law; therefore, by necessary implication, all the procurers and abettors of it are principals or accessories, upon the same circumstances which will make such in a felony by the common law.⁷⁹ The same peremptory challenges are allowed.⁸⁰ Where a common-law offense has been adopted by statute it is adopted with all its common-law elements, and in an indictment for such an offense all the common-law requirements must be observed.⁸¹ A statute of New York legalized all marriages where one or both of the parties were slaves and declared their issue legitimate. By a proviso it was not to operate as an emancipation. The rule was recognized that when both the parents were slaves the children would follow the condition of the mother, and it was held that *a fortiori* it ought to be so where the mother is *free* and the father a *slave*. It was

⁷⁸ Hanchett v. Weber, 17 Ill. App. 114, 117; Koning v. Bayard, 2 Painé, 251, Fed. Cas. No. 7924; Haight v. Holley, 3 Wend. 258; Rogers v. Kneeland, 10 Wend. 218; Fox v. Phelps, 20 Wend. 447; United States v. Babbit, 1 Black, 55, 61, 17 L. Ed. 94; People v. Chicago, 152 Ill. 546, 38 N. E. 744; Harrison v. People, 92 Ill. App. 643; Chouteau v. Missouri Pac. Ry. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; State v. Thomas, 138 Mo. 95, 39 S. W. 481; State v. Mason, 155 Mo. 486, 55 S. W. 636; Doyle v. Doyle,

50 Ohio St. 330, 34 N. E. 166; Lewis v. Mynott, 105 Tenn. 508, 58 S. W. 857. "A statute is not to be enlarged by implication unless it is necessary in order to make it effective to accomplish the object that it was designed to subserve." Yatter v. Smilie, 72 Vt. 349, 47 Atl. 1070.

⁷⁹ Coalheavers' Case, 1 Leach, C. C. 64, 66.

⁸⁰ Gray v. Reg., 11 Cl. & Fin. 427, 460.

⁸¹ State v. Absence, 4 Porter, 397.

held that the general law of *báron and feme* did not apply; by such a marriage a *free* wife was not subject to the custody and control of a *slave* husband; the husband was not emancipated nor the wife enslaved by such a marriage; that the condition of the children of such a marriage followed the condition of the mother.⁸² A statute gave a right of action on the sheriff's official bond to any person aggrieved by his misconduct or that of his deputy. The requisite proof being made, the law which furnished this remedy supplies the necessary privity by giving the right of action.⁸³

§ 501. A bankruptcy law provided that "proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it." It was held to imply that proceedings commenced after its passage should be affected by the law.⁸⁴ A statute authorizing a wife to contract with her husband was held to imply the right to sue him with respect to such contracts.⁸⁵ An act which fixed the fees of justices of the peace in criminal cases required them to report to the county commissioners under oath an itemized statement of their fees in all criminal cases, showing what fees had been paid them. It was held that by implication the county commissioners were required to pay the unpaid fees.⁸⁶ Where a statute declares that the homestead of a married person cannot be conveyed or incumbered except by an instrument executed and acknowledged by both husband and wife, it implies that an instrument not so executed is void.⁸⁷ Where the right to recover punitive damages was given, it was held that the right to recover compensatory damages was implied.⁸⁸ Where a city council was given power to create offices, it was held to imply the power to abolish them at pleasure.⁸⁹ Where a statute

⁸² Overseers, etc. v. Overseers, etc., 20 John. 1, 3.

⁸³ Governor v. Roby, 34 Ga. 176.

⁸⁴ Foley-Bean Lumber Co. v. Sawyer, 76 Minn. 118, 78 N. W. 1038.

⁸⁵ Alexander v. Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.

⁸⁶ Barrett v. Stutsman County, 4 N. D. 175, 59 N. W. 964.

⁸⁷ Gleason v. Spray, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47.

⁸⁸ Henderson v. Kentucky Cent. R. R. Co., 86 Ky. 389, 5 S. W. 875.

⁸⁹ Board of Councilmen v. Brow-

provides that a certain matter may be pleaded as a defense, it necessarily includes the right to prove the plea.⁹⁰ An act which punished book-making and pool-selling on events outside the state was held by implication to permit the same on events within the state.⁹¹ Where a statute provides that marriages solemnized under certain conditions without a license shall not be void, it implies that all other marriages solemnized without a license shall be void.⁹²

A statute provided that if the husband died intestate the widow should have all of the personal property, if there were no children, and, if there were children, then one-half of the first four hundred dollars and one-third of the remainder. The statute of wills provided that, if any provision be made for the widow in the will of her husband, she may elect to take under the will or be endowed of the lands of the deceased and take the distributive share of his personal estate; and if she fails to elect, that she retain the dower and share of the personal estate that she would be entitled to if there was no will. A man died and left a will by which he gave all of his estate to his children and others and nothing to his widow. It was claimed that she could not take under the former statute because her husband did not die intestate, and that she could not elect because no provision was made for her in the will. But the court held that the evident intent of the statute was that the widow should have a right to so much of the personal estate as was provided in the first statute, and that this right was not dependent upon the husband dying intestate or making a provision for her in his will. The court, after referring to the statutes, says: "So that the language employed in these two sections, regulating the matter of her election, import as plainly as language can make it,

ner, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497.

⁹⁰ National Lead Co. v. Groto Paint Store Co., 80 Mo. App. 247.

⁹¹ State v. Thomas, 138 Mo. 95, 39 S. W. 481. But see State v. Burgoerfer, 107 Mo. 1, 17 S. W. 646.

⁹² Offield v. Davis, 100 Va. 250, 40 S. E. 910.

that the widow's right to a distributive share of her deceased husband's personal estate exists at law, and is not dependent either upon his dying intestate, or upon his making some provision for her in his will when he dies testate. That which is plainly implied in the language of a statute is as much a part of it as that which is expressed. No statute should be so construed as to lead to an absurd result. A contrary construction leads to this: that if a husband makes any provision in his will for his wife, however small, and dies leaving children, she may renounce this and take her distributive share of his personalty, as if he had died intestate; but if he makes no provision for her, then she can receive nothing as a distributee. This could not have been the intention of the legislature, and can only be arrived at by the most rigid adherence to the letter of the statute, and a total disregard of the intention as disclosed by the language, and the liberal policy of the law on the subject. *Qui haeret in litera, haeret in cortice*: Courts are not confined to the letter of a law in giving it a construction. A statute must be construed with reference to the subject-matter of it, and its real object and true intent."⁹³

Where a guardian was empowered with the leave of the court to compound "a debt or demand" of his ward, it was held that the words "debt or demand" did not include a claim for unliquidated damages and that he could compromise such claims without the leave of court, there being no implied prohibition upon such action.⁹⁴ Power to the mayor of a city to release any person imprisoned for the violation of a city ordinance does not include power to release a judgment under which such imprisonment may be made.⁹⁵ The duty of a public officer to give a bond will not be implied unless the implication is a necessary one.⁹⁶

⁹³ Doyle v. Doyle, 50 Ohio St. 330, 341, 34 N. E. 166.

⁹⁴ Manion v. Ohio Valley Ry. Co., 99 Ky. 504, 36 S. W. 530.

⁹⁵ Newton v. Bergbower, 63 Ill. App. 201.

⁹⁶ Logan County Commissioners v. Harvey, 6 Okl. 629, 52 Pac. 402. The court says that "a duty cannot be said to be imposed by implication of law, unless it is clearly apparent that the legislature, in

A law may by implication require the giving of notice,⁹⁷ and this implication will more readily be made where the act would be void, if notice was not required either expressly or by implication.⁹⁸ A provision in a statute that contested elections for a certain office shall be prosecuted before a specified court confers jurisdiction on the court in such cases.⁹⁹ Power to a municipal corporation to appropriate a part of the general revenue for the payment of any money to become due by virtue of a contract to purchase a water, light or power plant, implies power to purchase such plant.¹

§ 502 (335). The law annexes by implication the incident to all public laws that they be noticed *ex officio* by the courts.² But private statutes will not be so taken notice of;³ statutes applying to private rights do not affect the crown or government.⁴ Where a statute, with a view of affording protection to the public, imposes a penalty for doing an act, it thereby prohibits it and renders it illegal.⁵ Thus, a statute which imposes a penalty on a person who

enacting the law from which the implication arises, meant to impose the duty. It is not enough that the legislature *may* have meant what it is claimed arises by implication; but, in order that a duty may be so imposed, it must appear from necessity, and a mere possibility that it may have been intended to require the officer to give bond is not sufficient to warrant the court in holding that the law required the bond to be given."

⁹⁷ Taylor v. Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922.

⁹⁸ Cole Manufacturing Co. v. Falls, 90 Tenn. 466, 16 S. W. 1045. Where notice was expressly required it was held the general statute as to the service of notice would apply. Mississippi River &

B. T. Ry. Co. v. Jones, 54 Mo. App. 529.

⁹⁹ State v. Slover, 134 Mo. 10, 31 S. W. 1054, 34 S. W. 1102.

¹ Austin v. McCall, 95 Tex. 565, 68 S. W. 791.

² *Ante*, §§ 319, 457; 2 Kent's Com. 460.

³ *Id.*; Dwarries, 471.

⁴ United States v. Hewes, Crabbe, 307, Fed. Cas. No. 15,359; Jones v. Tatham, 20 Pa. St. 398; Divine v. Harvie, 7 T. B. Mon. 443, 18 Am. Dec. 194. The state is bound by public laws for the promotion of learning, the advancement of religion, and the support of the poor, although not expressly named. Bac. Abr., Stat. I. C.; Gladney v. Deavors, 11 Ga. 79.

⁵ D'Allex v. Jones, 2 Jur. (N. S.)

exercises or occupies himself as a surgeon without being licensed is a prohibition of such practice, as it disables the person not admitted to recover for services as a surgeon.⁶

§ 503 (336). Every contract made for or about any matter or thing which is prohibited or made unlawful by statute is void, though the statute does not mention that it shall be so, but only inflicts a penalty upon the offender.⁷ Obedience to the laws is enforced by declaring illegal contracts void; by refusing to aid either party in the enforcement of them.⁸ When a statute is for revenue purposes, or is a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest the contract will be valid.⁹ All cases to

979; *Bartlet v. Viner*, Skin. 322; *O'Brien v. Dillon*, 9 Ir. C. L. (N. S.) 318; *Stephens v. Robinson*, 2 Crompt. & J. 209; *Cope v. Rowlands*, 2 M. & W. 149.

⁶ *D'Allex v. Jones*, 2 Jur. (N. S.) 979; *Niemeyer v. Wright*, 75 Va. 239; *Bensley v. Bignold*, 5 B. & Ald. 335; *The Pioneer*, Deady, 72; *Holt v. Green*, 73 Pa. St. 198, 13 Am. Rep. 737; *Taylor v. Crowland Gas Co.*, 10 Ex. 293.

⁷ *O'Brien v. Dillon*, 9 Ir. C. L. (N. S.) 318; *Griffith v. Wells*, 3 Denio, 226; *Bach v. Smith*, 2 Wash. Ty. 145; *Bancroft v. Dumas*, 21 Vt. 456; *Boutwell v. Foster*, 24 Vt. 485; *Hook v. Gray*, 6 Barb. 398; *Gray v. Hook*, 4 N. Y. 449; *Tylee v. Yates*, 3 Barb. 222; *Barton v. Port J. etc. Plk. R. Co.*, 17 Barb. 397; *Pennington v. Townsend*, 7 Wend. 276; *Nellis v. Clark*, 4 Hill, 424; *De Begnis v. Armistead*, 10 Bing. 107; *Cope v. Rowlands*, 2 M. & W. 149; *Springfield Bank v. Merrick*, 14

Mass. 322; *Hallett v. Novion*, 14 John. 273; *Seidenbender v. Charles*, 4 S. & R. 159, 8 Am. Dec. 682.

⁸ *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468; *Bloom v. Richards*, 2 Ohio St. 387; *Steers v. Lashley*, 6 T. R. 61; *Cannan v. Bryce*, 3 B. & Ald. 179; *Aubert v. Maze*, 2 B. & P. 371; *Ætina Ins. Co. v. Harvey*, 11 Wis. 394; *Williams v. Cheney*, 3 Gray. 215; *Jones v. Smith*, id. 500; *Towle v. Larrabee*, 26 Me. 464; *Pattee v. Greely*, 13 Met. 284; *Lovejoy v. Whipple*, 18 Vt. 379, 46 Am. Dec. 157; *O'Donnell v. Sweeney*, 5 Ala. 467; *Fennell v. Ridler*, 5 B. & C. 406. But see *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Clark v. Middleton*, 19 id. 53.

⁹ *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901; *Tyson v. Thomas*, McClel. & Y. 119; *Law v. Hodson*, 11 East, 300; *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538; *Cundell v. Dawson*, 4 C. B. 376; *Little v. Poole*, 9 B. & C. 192; *Niemeyer v.*

which a statute cannot constitutionally apply will be excepted by necessary implication, however absolute and express the provision may be.¹⁰ A necessary implication means not natural necessity, but so strong a probability of an intention that one contrary to that which is imputed to the party using the language cannot be supposed.¹¹

§ 504 (337). Wherever the provision of a statute is general everything which is necessary to make such provision effectual is supplied by the common law¹² and by implication. A grant of lands from the sovereign authority of a state to individuals to be possessed and enjoyed by them in a corporate capacity confers a right to hold in that character.¹³ A legislative grant made to an alien by necessary implication confers the right to receive and enjoy without prejudice on account of alienage.¹⁴ Trustees, under an act of parliament for dividing and inclosing a common, being intended to continue and hold permanently, were thereby constituted a corporation by implication.¹⁵ A right to recover expenses incurred for the public good, under certain

- Wright, 75 Va. 239, 40 Am. Rep. 720; Conley v. Sims, 71 Ga. 161; Johnson v. Hudson, 11 East, 180; Brown v. Duncan, 10 B. & C. 93; King v. Birmingham, 8 B. & C. 29; Milford v. Worcester, 7 Mass. 48; Parton v. Hervey, 1 Gray, 119; Bly v. National Bank, 79 Pa. St. 453; Swan v. Blair, 3 Cl. & F. at p. 632; Vining v. Bricker, 14 Ohio St. 331; Pangborn v. Westlake, 36 Iowa, 546; Bemis v. Becker, 1 Kan. 226; Lindsey v. Rutherford, 17 B. Mon. 245; Strong v. Darling, 9 Ohio, 201; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; Bailey v. Harris, 12 Q. B. 905; Watrous v. Blair, 32 Iowa, 58; Fergusson v. Norman, 5 Bing. N. C. 76; Fowler v. Scully, 72 Pa. St. 456, 13 Am. Rep. 699; Foster v. Oxford, etc. R. R. Co., 13 C. B. 200; Chouteau v. Allen, 70 Mo. 290; Howell v. Stewart, 54 id. 400; Babcock v. Goodrich, 47 Cal. 488; United States v. Martin, 94 U. S. 400, 24 L. Ed. 128; O'Hare v. National Bank, 77 Pa. St. 96.
- ¹⁰ Opinion of Justices, 41 N. H. 553.
- ¹¹ Wilkinson v. Adam, 1 Ves. & B. 466; State v. Union Bank, 9 Yerg. 164.
- ¹² 6 Bac. Abr. 369; Booth v. Kitchen, 7 Hun. 260, 264; Livingston v. Harris, 11 Wend. 329, 340.
- ¹³ North Hempstead v. Hempstead, 2 Wend. 109; Goodell v. Jackson, 20 John. 706.
- ¹⁴ Goodell v. Jackson, 20 John. 706; Jackson v. Lervey, 5 Cow. 397.
- ¹⁵ Newport M. Trustees, Ex parte, 16 Sim. 346.

conditions, was granted by statute to the "local authority" authorized to act in the execution of the statute; it was held the action for that purpose might be prosecuted by that collective statutory designation, though not made a corporation.¹⁶

§ 505 (338). A statute of Michigan "relative to the rights of married women," in brief and comprehensive words, gave to the wife the full and absolute control of her real and personal estate, with power to contract, sell, transfer, mortgage, convey, devise and bequeath the same, in the same manner, and with the like effect, as if she were unmarried. This statute had the effect to abolish or abrogate the prospective estate by the curtesy.¹⁷ A statute declaring that property which accrues to a married woman shall be "owned and enjoyed" as her separate property will authorize her, if the property be merchandise, to trade. It is the nature of merchandise to be sold and exchanged. When, therefore, the statute authorizes married women to own, use and enjoy such property, it legalizes trade by them — makes them merchants.¹⁸ So she is liable for repairs to her separate estate, made at her request and necessary for its preservation and enjoyment.¹⁹ The statute provides that any married woman might convey real estate "in the same manner, and with the like effect, as if she were unmarried." This implied a repeal as to married women and their separate estates of the general statute requiring a private examination apart from their husbands upon their acknowledgment of the execution of conveyances.²⁰ A power given to a married woman to carry on a trade or business on her separate account includes the power to borrow money, and

¹⁶ *Mills v. Scott*, L. R. 8 Q. B. 496.

¹⁷ *Tong v. Marvin*, 15 Mich. 60.

¹⁸ *Wieman v. Anderson*, 42 Pa. St. 311, 317.

¹⁹ *Lippincott v. Hopkins*, 57 Pa. St. 338; *Lippincott v. Leeds*, 77 id. 420.

²⁰ *Blood v. Humphrey*, 17 Barb.

660; *Andrews v. Shaffer*, 12 How. Pr. 441; *Yale v. Dederer*, 18 N. Y. 271; *Wiles v. Peck*, 26 id. 47; *Richardson v. Pulver*, 63 Barb. 67.

to purchase on credit property, real or personal, necessary or convenient, for the purpose of commencing, as well as the power to create debts in the prosecution of the trade or business after it has been established.²¹ Where a married woman who has a separate estate and carries on business in relation thereto, keeping a bank account in her own name, draws a check upon such account payable at a future day, on which she borrows money, the law presumes, in the absence of evidence to the contrary, that such money was borrowed for the benefit of her separate estate, and holds her liable therefor.²²

§ 506 (339). A statute of New York gave an appeal to "every person who shall think himself aggrieved by any judgment or order of any justice or justices," etc. Where a defendant, served with a summons which was to show cause, failed to appear and judgment went against him by default, it was treated as equivalent to a judgment by confession, and therefore he was not entitled to consider himself aggrieved and to appeal.²³ An association was granted the privilege of constructing the Albany basin, and it was made a condition that they should erect the necessary bridges for the public accommodation. The grant was construed to imply an obligation to keep the bridges in repair.²⁴ A statute providing for partition and requiring the plaintiff in his complaint to give a statement of all the rights and titles of the parties, directed service on all the parties concerned, and the guardians of such as were minors. As it was deemed that minors were not competent to make a statement of the rights and titles of the parties, it was held that the statute did not apply where all the owners were minors.²⁵

²¹ *Frecking v. Rolland*, 53 N. Y. 422; *Chapman v. Foster*, 6 Allen, 136. See *Zurn v. Noedel*, 113 Pa. St. 336, 6 Atl. 63; *Bovard v. Kettering*, 101 Pa. St. 181; *Morrison v. Thistle*, 67 Mo. 596.

²² *Nash v. Mitchell*, 8 Hun, 471.

²³ *Adams v. Oaks*, 20 John. 282;

Adams v. Foster, id. 452. See *Schuster v. Supervisors*, 27 Minn. 253, 6 N. W. 802; *Vanderstolph v. Boylan*, 50 Mich. 330, 15 N. W. 495.

²⁴ *People v. Cooper*, 6 Hill, 516.

²⁵ *Gallatian v. Cunningham*, 8 Cow. 361.

§ 507 (340). It is a principle or truism that for every wrong there is afforded by the law an appropriate remedy. Upon every statute made for the redress of any injury, mischief or grievance, an action lies by the party aggrieved, either by the express words of the statute or by implication.²⁶ In other words, if a statute which creates a right does not indicate expressly the remedy, one is implied, and resort may be had to the common law, or the general method of obtaining relief which has displaced or supplemented the common law.²⁷ A statute provided a penalty for the commission of a fraud, which was "to be sued for in any court of competent jurisdiction for the benefit of the person or persons, etc., upon whom such fraud shall be committed." It was implied the suit should be brought in the name of the defrauded party.²⁸ An act authorized the improvement of a river, provided for compensation to be made to any who were damaged thereby, and appointed a special tribunal to ascertain and fix such compensation consisting of commissioners named in the act, who were empowered to appoint their own successors. The commissioners named all died without appointing any successors. It was held that an action would lie for damages occasioned by the exercise of the powers conferred by the act.²⁹

§ 508 (341). Whenever a power is given by statute, everything necessary to make it effectual or requisite to attain the end is implied.³⁰ It is a well established principle that statutes containing grants of power are to be construed so

²⁶ Van Hook v. Whitlock, 2 Edw. 304, 311; Bullard v. Bell, 1 Mason, 290, Fed. Cas. No. 2121. To give a reasonable effect to the word "from" in reference to the subject-matter, it was held proper to consider the extrinsic situation, and if the object of the act could not otherwise be accomplished it should be construed as inclusive. Smith v. Helmer, 7 Barb. 416.

²⁷ Winn v. Ficklen, 54 Ga. 529. See *post*, § 575.

²⁸ Thompson v. Howe, 46 Barb. 287.

²⁹ Bentley v. Manchester, etc. Ry. Co., (1891) 3 Ch. 222.

³⁰ 1 Kent's Com. 464; Stief v. Hart, 1 N. Y. 20, per Jewett, C. J.; Mitchell v. Maxwell, 2 Fla. 594; Re Neagle, 39 Fed. 833; S. C., 135 U. S. 1; Commonwealth v. Conyngnam, 66 Pa. St. 99; Witherspoon v. Dunlap, 1 McCord, 546.

as to include the authority to do all things necessary to accomplish the object of the grant.³¹ The grant of an express power carries with it by necessary implication every other power necessary and proper to the execution of the power expressly granted.³² The charter of a city provided that it might levy a special tax of not exceeding fifty cents

³¹ *People v. Eddy*, 57 Barb. 593; *Mayor, etc. v. Sands*, 105 N. Y. 210, 218, 11 N. E. 820; *Bateman v. Colgan*, 111 Cal. 580, 44 Pac. 238; *Highland Park v. McAlpine*, 117 Mich. 666, 76 N. W. 159; *Harrison v. Southwark & V. Water Co.*, (1891) 2 Ch. 409.

³² 1 Kent's Com. 404. The constitution of New York declares "no private or local bill which may be passed shall embrace more than one subject, and that shall be expressed in the title." The validity of an act "to amend the several acts in relation to the city of Rochester" was questioned on the ground of embracing a multiplicity of subjects. The principal point relied upon was that the authority conferred upon the water commissioners by one section of the act, to contract with the trustees of villages through which the water to the city might be conducted to supply such villages with water, and authorizing the trustees to levy the annual expense with their annual tax, was, one or both of them, an independent subject not embraced in the title. "It is not denied," said Church, C. J., "that provisions for furnishing the city with a supply of water relate to the legitimate functions of a city government, and are properly included in such a bill as this. That object, it seems, was secured by an inde-

pendent bill to which these provisions are amendments. The purpose of both is to furnish the city with water for the extinguishing of fires and other public uses, and also to furnish the inhabitants of the city with pure water for domestic purposes. The latter may be regarded as a means or instrumentality of accomplishing the former. To secure this object it is assumed to be necessary for the city authorities to go beyond the limits of the city to procure the necessary supply, and, in doing so, they must come in contact and deal with private and other interests in no way connected with the city. They must take private property, pass over and use public highways, streets, and, perhaps, railroads. The authority to secure the right, although it may involve details in no other way connected with the city, and may affect other persons or corporations and their property, does not constitute it an independent subject. The power to supply villages with water by contract is incidental to the main purpose, and may serve as a means of attaining it. The authority conferred upon the trustees to levy the tax was indispensable to render the contract effectual. The power to sell involves the power to buy and pay for, and taxation was the only mode which could be adopted for that

on the hundred dollars "for the sole purpose of creating a sinking fund to be used in retiring the bonds of the city as they become due." The charter was silent as to the custody and management of the fund. The city levied such a tax and passed an ordinance providing for sinking fund commissioners, directing the tax to be paid over to them, and requiring them to invest it in city bonds. The court held that the ordinance was the proper mode of carrying the charter into effect, and that when a power is given by statute, everything necessary to make it effectual is given by implication.³³

Where the law commands anything to be done it authorizes the performance of whatever may be necessary for executing its commands.³⁴ When a justice of the peace is required to issue a warrant for the collection of costs made on a hearing before him, it is implied that he has power to decide on the amount.³⁵ When an existing jurisdiction is enlarged so as to include new cases, it is not necessary to declare that the old provisions shall apply to the new cases. If, for example, the jurisdiction of justices of the peace should be extended to actions of slander, the existing provisions for a review by *certiorari* and appeal would apply to cases coming under the enlarged as well as arising under the former jurisdiction of the court.³⁶ It is an established rule that where an action founded upon one statute is given by a subsequent statute in a new case, everything annexed to the action by the first statute is likewise given.³⁷ The power to grant temporary alimony is incidental to the divorce jurisdiction.³⁸ If an act merely directs a particular measure to be taken, it must be understood as referring its execution to the proper existing agents, and to annex, by impli-

purpose." *People v. Briggs*, 50 N. Y. 553. See *Odell v. De Witt*, 53 N. Y. 643.

³³ *State v. Sinking Fund Commissioners*, 1 Tenn. Cases, 490.

³⁴ *Foliamb's Case*, 5 Coke, 116.

³⁵ *Voorhees v. Martin*, 12 Barb. 508.

³⁶ *People v. Commissioners*, 3 Hill, 599.

³⁷ *Baltimore, etc. R. R. Co. v. Wilson*, 2 W. Va. 528, 556.

³⁸ *Goss v. Goss*, 29 Ga. 109; *McGee v. McGee*, 10 id. 477.

cation, all the ordinary means for carrying the measure into effect.³⁹ Where an inferior court is empowered to grant an injunction, it has power to enforce its observance by punishing disobedience; such power being essential to afford relief by injunction.⁴⁰ A statute authorizing a magistrate to examine such witnesses as might be brought before him authorizes him to issue subpoenas for them, and to compel their attendance by the usual process of the court.⁴¹

§ 509 (342). Where the statutory judicial jurisdiction in a case of contested election is specially confined to certain specified courts and is not a method of redress in every case in which an alleged illegal election has occurred, it can only be exercised with reference to the grounds of contest enumerated in the act; otherwise jurisdiction would have been given in general terms.⁴² Where the jurisdiction given is general, it includes authority to decide all matters and questions involved in the contest. "It may determine which contestant is elected, or if, from fraud or any other circumstances, it be of opinion that there has been no legal election, it may so adjudge, and declare that the office in question is vacant."⁴³ Courts having inherently the power of revising the proceedings of all inferior jurisdictions, may in the exercise of that power correct errors on the face of their proceedings, but not rejudge their judgments on the merits. This correctional power extends no further than to keep such inferior tribunals within the limits of their jurisdiction and to compel them to exercise it with regularity.⁴⁴ A statute conferred jurisdiction upon the supreme court to review

³⁹ *United States v. Wyngall*, 5 Hill, 16.

⁴⁰ *Martin, Ex parte*, L. R. 4 Q. B. Div. 212.

⁴¹ *People v. Hicks*, 15 Barb. 160; *Matter of Oath Before Justices*, 12 Coke, 130.

⁴² *Ellingham v. Mount*, 43 N. J. L. 470. See *Anderson v. Levely*, 58 Md. 192.

⁴³ *Anderson v. Levely*, 58 Md. 192; *Handy v. Hopkins*, 59 Md. 157. See *People v. Chapin*, 105 N. Y. 300, 11 N. E. 510, as to a general power given to the comptroller to cancel tax sales and refund the money to the purchaser.

⁴⁴ *Carpenter's Case*, 14 Pa. St. 486.

the report of commissioners of estimate and assessment for opening a street. It was held that the power was conferred to be exercised by it as a court, and not as a tribunal of inferior jurisdiction created by a statute, or by its justices or commissioners appointed by the legislature. Gardner, J.: "The powers incident to its general jurisdiction, so far as applicable, at once attached to the new subject. In administering this law, as every other, the court could require the services of its officers, punish for contempt, issue attachments, use the buildings appropriated to the ordinary business of the court, and set aside the proceedings on sufficient cause."⁴⁵ Where the judgment of an appellate court on *certiorari* is made final by statute, this finality extends to the award of costs on the *certiorari*, and execution for the same in the case removed.⁴⁶ If the law give a discretion to do or not to do a particular thing in the trial of a cause in court, without specifying by whom it is to be exercised, the judge, who is the expounder of the law and the controller of power, is, by general intendment, the depository of that discretion.⁴⁷ Courts of record have inherent power to make orders or general rules not contravening the law to regulate their proceedings in the exercise of their jurisdiction; and this power may be granted them by statutes which vest in them a new jurisdiction.⁴⁸ It is not competent for the superior courts to make a rule restricting the discretion of the trial

⁴⁵ *Matter of Canal and Walker* Sts., 12 N. Y. 406.

⁴⁶ *Palmer v. Lacock*, 107 Pa. St. 346; *Silvergood v. Storrick*, 1 Watts, 532.

⁴⁷ *Caldwell v. State*, 34 Ga. 18, 19.

⁴⁸ *Anderson v. Levely*, 58 Md. 192; *Fullerton v. Bank of U. S.*, 1 Pet. 604, 7 L. Ed. 280; *Brooks v. Boswell*, 34 Mo. 474; *Boas v. Nagle*, 3 S. & R. 253; *Snyder v. Bauchman*, 8 id. 336; *Deming v. Foster*, 42 N. H. 165; *Suckley v. Rotchford*, 12 Gratt. 60; *Barry v. Randolph*, 3 Binn. 277;

Walker v. Ducros, 18 La. Ann. 708; *Vanatta v. Anderson*, 3 Bin. 417; *People v. McClellan*, 31 Cal. 101; *Kennedy v. Cunningham*, 2 Met. (Ky.) 538; *David v. Ætna Ins. Co.*, 9 Iowa, 45; *People v. Chew*, 6 Cal. 636; *Lynch v. State*, 9 Ind. 541; *Sellers v. Carpenter*, 27 Me. 497; *Vail v. McKernan*, 21 Ind. 421; *Gist v. Drakely*, 2 Gill, 330, 41 Am. Dec. 426; *Seymour v. Phillips, etc. Co.*, 7 Biss. 460, Fed. Cas. No. 12,689; *Texas Land Co. v. Williams*, 48 Tex. 602.

court on matters as to which that discretion at common law is unlimited, as in the recall of a witness.⁴⁹ The authority to punish for contempt is granted as a necessary incident to every tribunal exercising jurisdiction as a court.⁵⁰ If a statute assumes jurisdiction to exist and regulates its exercise, it will confer it.⁵¹

§ 510 (343). When a statute gives a right or imposes a duty, it also confers by implication the power necessary to make the right available or to discharge the duty; hence the acts which directed that the board of police should take deeds of trust on real estate from the borrowers from the common school fund entitled them to make the right available by purchasing the land when sold for the payment of the debt due the school fund and to resell the same for the collection of the debt.⁵² Where a power is granted and the mode of its exercise not prescribed, it will be implied that it is nevertheless to be exercised.⁵³ By a declaratory provision the legislature enacted that a thing might be done which before that time was unlawful, and added a proviso that nothing therein contained should be so construed as to permit some matter embraced in the general provision to be done; this was held as an implied prohibition of the excepted act, though before that time it was lawful.⁵⁴ The power given to a sheriff to sell on execution the interest of a pledgor in goods pledged incidentally or by implication authorized him to take the goods out of the hands of the pledgee.⁵⁵ The legislature increased the salaries of certain judicial officers of a municipal corporation, which salaries were a charge on such corporation. Though there was no present fund to pay the same, the liability existing, there

⁴⁹ *De Lorme v. Pease*, 19 Ga. 220.

⁵⁰ *United States v. New Bedford Bridge*, 1 Woodb. & M. 401, Fed. Cas. No. 15,867; *State v. Morrill*, 16 Ark. 384; *Mariner v. Dyer*, 2 Me. 165; *Yates v. Lansing*, 9 John. 395; *Randall v. Pryor*, 4 Ohio, 424; *Gates v. McDaniel*, 3 Port. 356; *Lining v.*

Bentham, 2 Bay, 1; *Albright v. Lapp*, 26 Pa. St. 99, 6 Am. Dec. 402; *Perry v. Mitchell*, 5 Denio, 537.

⁵¹ *State v. Miller*, 23 Wis. 634.

⁵² *Gaines v. Faris*, 39 Miss. 403.

⁵³ *People v. Eddy*, 57 Barb. 593.

⁵⁴ *State v. Eskridge*, 1 Swan, 413.

⁵⁵ *Stieff v. Hart*, 1 N. Y. 20.

was held to be an implied power to create one, and that the city is subject to the ordinary modes of having legal liabilities enforced.⁵⁶ Power given to a municipal corporation to receive a grant of lands for the purpose of laying or widening streets includes in it the power to remove buildings.⁵⁷

§ 511 (344). When the legislature gives power to a public body to do anything of a public character, the legislature means also to give to such body all rights without which the power would become wholly unavailable, although such meaning cannot be implied in relation to circumstances arising accidentally only. In the power to lay sewers is implied the right as against the land-owner of subjacent support.⁵⁸ When a municipality is created to further certain objects of general concern, and there is given to it general powers to be used to that end, the legislature must be held to have intended to confer all power at any time needful thereto. From the general power to take lands to further the public health results the power, whenever it is necessary so to do, to take lands held and used for other prior public purposes.⁵⁹ The creation of a municipal corporation includes a grant of a new power to make by-laws or ordinances for the government of the inhabitants, and to enforce them.⁶⁰ The power to make an addition to a public building is included in the grant of power to erect and repair such building. A construction cannot be given to the laws conferring power to levy a tax for the "erection of public buildings," which would limit the exercise of the power to the erection of new houses, when the object of the law could even be attained at less expense by an addition to a public house already built.⁶¹ A railroad company was granted by statute a right to cross another railway by a

⁵⁶ *Green v. Mayor, etc.*, 2 Hilt. 203, 310.

⁵⁷ *Patchin v. Brooklyn*, 2 Wend. 377.

⁵⁸ *In re Corporation of Dudley*, L. R. 8 Q. B. Div. 93.

⁵⁹ *Matter of the City of Buffalo*, 68 N. Y. 167, 172.

⁶⁰ *State v. Young*, 3 Kan. 445.

⁶¹ *Brown v. Graham*, 58 Tex. 254.

bridge to be erected for that purpose; under this grant it was held that the grantee had the right for that purpose to place a temporary scaffolding on the property of the other party, and to do all other acts necessary for the enjoyment of the principal right of crossing.⁶² Power to sue for debts due to the estate is implied in the authority given to administrators *ad colligendum*, "to secure and collect the said property [i. e., of the estate], whether it be goods, chattels, debts or credits," etc.; it was held amply sufficient to authorize the bringing of suits if necessary for the purpose of executing the power.⁶³ Overseers of the poor of a town, being public agents and trustees of it in respect to the power, have necessarily, without express authority from the legislature, a capacity to sue commensurate with the public trusts and duties.⁶⁴

§ 512 (345). If a corporation is organized for a business which implies the necessity to raise money, the capacity to make notes and securities usual in such cases will be implied. Every corporation is by implication possessed of the power to employ the appropriate means to accomplish its chartered purpose.⁶⁵ A municipal corporation may exercise, as incidental to the purpose of its creation, such powers as will enable it fully to discharge the duties devolving on it.⁶⁶ It has the power, and it results from its corporate existence as a town, to erect a building suitable for the accommodation of officers and records, and for the preservation of its necessary property.⁶⁷ The right to erect such a structure is incidental to the powers expressly granted, or essential to

⁶² *Clarence Ry. Co. v. Great North of Eng. etc. Ry. Co.*, 13 M. & W. 706, 721.

⁶³ *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382.

⁶⁴ *Overseers of Pittstown v. Overseers of Pittsburgh*, 18 John. 407, 418.

⁶⁵ *Moraw. on Corp.*, § 350; *Williamsport v. Commonwealth*, 84 Pa.

St. 487, 24 Am. Rep. 208; *Slark v. Highgate Archway Co.*, 5 Taunt. 792; *Broughton v. Manchester Water Works Co.*, 3 B. & Ald. 1, 12; *Hoffman v. Pawnee County Commissioners*, 3 Okl. 325, 41 Pac. 566.

⁶⁶ *Van Sicklen v. Burlington*, 27 Vt. 70, 76.

⁶⁷ *Clarke v. Brookfield*, 81 Mo. 503, 511, 51 Am. Rep. 243.

carry out the objects of the corporation.⁶⁸ Power to purchase real estate necessary for county buildings was held to imply power to incur a debt therefor and to levy a tax to pay it, extending over a series of years; also to authorize the issuing of non-negotiable evidences of such debt, but not negotiable bonds.⁶⁹ A provision limiting the indebtedness which counties may incur, by implication confers power to incur indebtedness within that limit.⁷⁰

Where the charter of a corporation authorizes it to purchase land for a specified purpose, in the absence of evidence it will be presumed that any land purchased by it was acquired for the purpose authorized by the charter.⁷¹ If the taking effect of a statute depends on subsequent acts of executive officers, directed by the enactment to be done, it will be presumed that such acts when due have been performed.⁷² There is a like implication wherever any fact must precede an enactment.⁷³ Where legislation depends on facts to be ascertained by the legislature, the declaration of such facts in the act is taken as conclusive. Thus, where the legislature determines that a public improvement will be a benefit to the adjacent property, and that the expenses of making the same shall be paid by the owners of such property, the courts have nothing to do with the correctness or incorrectness of the determination, but must assume the fact to be as the legislature assumes or declares it.⁷⁴ Where the constitution provides that legislative acts shall not take effect until a future day, unless, for some emergency, the legislature deems it necessary to provide otherwise, if an act contains a provision that it go into effect immediately, it will be implied that in the judgment of the

⁶⁸ *State v. Haynes*, 72 Mo. 377.

⁷¹ *Mallett v. Simpson*, 94 N. C. 37.

⁶⁹ *Witter v. Board of Supervisors*, 112 Iowa, 380, 83 N. W. 1041. And see *Lund v. Chippewa County*, 93 Wis. 640, 67 N. W. 927, 34 L. R. A. 131.

55 Am. Rep. 595.

⁷² *Stine v. Bennett*, 13 Minn. 153; *State v. Dunning*, 9 Ind. 20.

⁷³ *State v. Noyes*, 47 Me. 189.

⁷⁰ *Fenton v. Blair*, 11 Utah, 78, 39

⁷⁴ *People v. Lawrence*, 36 Barb.

Pac. 485.

177.

legislature there was an emergency; and if the circumstance that an emergency exists is stated in the act, when such statement is required, it will be assumed by the courts that it is sufficient.⁷⁵ Special acts of incorporation for constructing railroads, or probably any special act, will be valid notwithstanding the constitutional provision requiring general laws for such purposes, if in the judgment of the legislature the object in view cannot be attained under general laws. Such a determination is implied from the act being passed.⁷⁶

§ 513. Acts deemed to refer and apply to persons and things within the state and within the power of the legislature.—An act of parliament provided that the premiums paid on life insurance in certain companies might be deducted from the assessment for the income tax. A later statute extended this privilege to any person insured “in or with *any insurance company existing on the first day of November, 1844,*” or in or with any insurance company registered pursuant to a certain act. It was held that the words in italics did not include a foreign insurance company in existence on the date specified. Lord Esher, M. R., in course of his opinion, said: “Now, supposing the words ‘any insurance company’ stood alone, and there were nothing else in the section to modify the view which one would take of their meaning, would it or would it not be right to say that those words in an English act of parliament would include all foreign insurance companies, wheresoever they might be? What is the rule of construction which ought to be applied to such an enactment, standing alone? It seems to me that, unless parliament expressly declares otherwise, in which case, even if it should go beyond its rights as regards the comity of nations, the courts of this country must obey the enactment, the proper construction to be put upon general words used in an English act of parliament is, that parliament was dealing only with such persons or things as are within the general words and

⁷⁵ Gentile v. State, 29 Ind. 409.

⁷⁶ Johnson v. Joliet, etc. R. R. Co., 23 Ill. 202.

also within its proper jurisdiction, and that we ought to assume that parliament (unless it expressly declares otherwise), when it uses general words, is only dealing with persons or things over which it has properly jurisdiction. It has been argued that that is so only when parliament is regulating the person or thing which is mentioned in the general words. But it seems to me that our parliament ought not to deal in any way, either by regulation or otherwise, directly or indirectly, with any foreign person or thing which is outside its jurisdiction, and, unless it does so in express terms so clear that their meaning is beyond doubt, the courts ought always to construe general words as applying only to persons or things which will answer the description and which are also within the jurisdiction of parliament. If, therefore, those words stood alone, I should be of opinion that the insurance companies mentioned must be insurance companies over which our parliament has jurisdiction, and that the section should be confined to such companies.”⁷⁷

The general language of an anti-trust act, though broad enough to include a combination entered into without the state, was limited by the court to acts done within the state.⁷⁸ So the general language of a statute will be limited to what is within the constitutional power of the legislature.⁷⁹ Statutes requiring telegraphic messages to be transmitted without delay or partiality does not apply to acts or defaults without the state, though with reference to a message to or from a point within the state.⁸⁰ But where a message sent from one state was delayed within another state, the laws of the latter state were held to apply.⁸¹ A

⁷⁷ Colquhoun v. Heddon, L. R. 25 Q. B. D. 129, 134, 135.

⁷⁸ People v. Butler Street Foundry & Iron Co., 201 Ill. 236, 66 N. E. 349. To same effect, State v. Gritzner, 134 Mo. 512, 36 S. W. 39.

⁷⁹ McCullough v. Virginia, 172 U. S. 102, 19 S. C. Rep. 134, 43 L. Ed. 382.

⁸⁰ Connell v. Western Union Tel. Co., 108 Mo. 459, 18 S. W. 883; Rixhe v. Western Union Tel. Co., 96 Mo. App. 406, 70 S. W. 265.

⁸¹ Gray v. Telegraph Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706.

state may punish betting and pool selling within its limits on events without the state.⁸² A statute of New York exempted from the payment of any inheritance tax children adopted as such in conformity with the laws of New York. This was held to include children adopted in another state under a statute substantially like that of New York.⁸³ An insolvency law was held not to discharge debts created in another state and merged in a judgment obtained in such other state.⁸⁴ A Missouri statute allowing ten per cent. damages and a reasonable attorney's fee in suits on an insurance policy, where payment has been vexatiously refused, was held not to apply to a suit on a policy issued in Kansas on property in that state.⁸⁵

§ 514. Whether state or public corporation embraced by general words of statute.— It is a general rule that the state is not bound by the general words of a statute, which, if applied, would operate to trench on its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it, unless the contrary is expressly declared or necessarily implied.⁸⁶ Where the state had established by law in a certain county dispensaries for the sale of liquor, a later prohibition law for the same county was held not to affect the state agencies.⁸⁷ The same rule applies in large measure to public corporations, such as counties, towns, school districts and municipalities. Such corporations are held not to be included in the general words of mechanics' lien laws, garnishment laws and the like.⁸⁸ A county was held not to be bound by a general

⁸² *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795.

⁸³ *Matter of Butler*, 58 Hun, 400, 12 N. Y. 201.

⁸⁴ *Lowenberg v. Levine*, 93 Cal. 215, 28 Pac. 941, 16 L. R. A. 159.

⁸⁵ *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. 889.

⁸⁶ *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646, 23 Am.

St. Rep. 451; *Skelly v. School District*, 108 Cal. 652, 37 Pac. 643; *Butler v. Merritt*, 113 Ga. 238, 38 S. E. 751; *Seton v. Hoyt*, 34 Ore. 266, 55 Pac. 967, 75 Am. St. Rep. 641; *Black on Interpretation of Statutes*, pp. 119-122.

⁸⁷ *Butler v. Merritt*, 113 Ga. 238, 38 S. E. 751.

⁸⁸ *Mayrhofer v. Board of Educa-*

interest statute.⁸⁹ A statute required corporations, before commencing suit, to file a bond for costs. It was held to apply to private corporations only and not to include a school district.⁹⁰

§ 515. **Mistake of legislature as to existence, application or effect of a statute.**—Where a statute refers to a repealed statute as if the latter was still in force, such reference has no effect to revive or put in force the repealed act.⁹¹ The assumption or recognition by the legislature that trust companies possessed certain powers does not operate to confer such powers.⁹² Recitals in a law indicating an opinion of the legislature that a registration law applied to special elections in cities does not make such law apply, in the absence of an enactment to that end.⁹³ “It is a familiar rule of statutory construction,” says the court, “that the opinion of the legislative body as to the construction of a law can have no force unless it is given force by being enacted into a law. That the legislature has, by way of recitals or otherwise, shown that it thought a certain law already upon the statute book would receive a certain interpretation cannot influence the courts in construing such statute.” Where a place is incorporated as the “Town of Valdosta,” it does not become a city by being referred to in subsequent acts as a city.⁹⁴

§ 516. **Miscellaneous.**—In general the same rules of construction apply to constitutions as to statutes.⁹⁵ A statute

tion, 89 Cal. 110, 26 Pac. 646, 23 Ed. 60. See also *State v. Berman*, Am. St. Rep. 451; *Skelly v. School* 15 Wash. 24, 45 Pac. 652; *State v. District*, 103 Cal. 652, 37 Pac. 643; *La Grave*, 23 Nev. 120, 43 Pac. 470, *Stermer v. La Plata County*, 5 Colo. 35 L. R. A. 233.
App. 379, 38 Pac. 839; *Kein v. School District*, 42 Mo. App. 460. Mo. 562, 46 S. W. 593.

⁸⁹ *Seton v. Hoyt*, 34 Ore. 266, 55 Pac. 967, 75 Am. St. Rep. 641. ⁹³ *Graves v. Seattle*, 8 Wash. 248, 35 Pac. 1079.

⁹⁰ *Trustees of Common School District v. Flemingsburg*, 97 Ky. 702, 31 S. W. 722. ⁹⁴ *Savannah, Fla. & W. Ry. Co. v. Jordan*, 113 Ga. 687, 39 S. E. 511.

⁹¹ *District of Columbia v. Hutton*, 143 U. S. 18, 12 S. C. Rep. 369, 36 L. ⁹⁵ *Jacobs v. Board of Supervisors*, 100 Cal. 121, 34 Pac. 630; *Park v. Candler*, 114 Ga. 466, 40 S. E. 523;

should be so construed as to give a sensible and intelligent meaning to every part,⁹⁶ to avoid absurd and unjust consequences⁹⁷ and, if possible, so as to make it valid and effective.⁹⁸ "It is familiar that if the words employed are susceptible of two meanings, that will be adopted which comports with the general public policy of the state, as manifested by its legislation rather than that which runs counter to such policy."⁹⁹ When a general intention is expressed in a statute and also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception and both are to have effect in their respective spheres.¹ An act provided

State v. McGowan, 138 Mo. 187, 39 S. W. 771; Rasmussen v. Baker, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773.

⁹⁶ Mechanics' & Traders' L. & B. Ass'n v. People, 72 Ill. App. 160; Hermanek v. Guthman, 72 Ill. App. 370; S. C. affirmed, 179 Ill. 563, 53 N. E. 966; Westfield Cem. Ass'n v. Danielson, 62 Conn. 319, 26 Atl. 345; Brook v. Blue Mound, 61 Kan. 184, 59 Pac. 273; State v. Barge, 82 Minn. 256, 84 N. W. 911, 1116, 53 L. R. A. 428; Curtis v. Stovin, L. R. 22 Q. B. D. 513.

⁹⁷ In re Chapman, 166 U. S. 661, 17 S. C. Rep. 677, 41 L. Ed. 1154; Tsoi Sim v. United States, 116 Fed. 920, 54 C. C. A. 154.

⁹⁸ Dobson v. State, 69 Ark. 376, 63 S. W. 796; Nugent v. Jackson, 72 Miss. 1040, 18 So. 493; Slocum v. Neptune, 68 N. J. L. 595, 53 Atl. 301; Territory v. Ashenfelter, 4 N. M. 93, 12 Pac. 879; Madden v. Hardy, 92 Tex. 613, 50 S. W. 926.

⁹⁹ Wheeler v. Wheeler, 134 Ill. 522, 530, 25 N. E. 588, 10 L. R. A. 613.

¹ Martin v. Election Commis-

sioners, 126 Cal. 404, 58 Pac. 932; Davis v. Dougherty County, 116 Ga. 491, 42 S. E. 764; Dahnke v. People, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197; People v. Hutchinson, 172 Ill. 486, 50 N. E. 599; Dodge v. Chicago, 201 Ill. 68, 66 N. E. 367; Boyd v. Brazil Block Coal Co., 25 Ind. App. 157, 57 N. E. 732; Arnold v. Council Bluffs, 85 Iowa, 441, 52 N. W. 347; Poor v. Watson, 92 Mo. App. 89; State v. District Court, 14 Mont. 452, 37 Pac. 9; Home B. & L. Ass'n v. Nolan, 21 Mont. 205, 53 Pac. 738; Cate v. Martin, 70 N. H. 135, 46 Atl. 54, 48 L. R. A. 613; McGinn v. State, 46 Neb. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450; State v. Cornell, 53 Neb. 556, 74 N. W. 59, 68 Am. St. Rep. 629; Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85; Wormser v. Brown, 149 N. Y. 163, 43 N. E. 524; Portland v. Gaston, 38 Ore. 533, 63 Pac. 1051; McAskie's Appeal, 154 Pa. St. 24, 26 Atl. 60; Kolb v. Reformed Episcopal Church, 18 Pa. Supr. Ct. 477; Hayes v. Arrington, 108 Tenn. 494, 68 S. W. 44; Howard Oil Co. v. Davis, 76 Tex. 630, 13 S. W. 665; People v. Utah

that no holder of a tax certificate should be entitled to a deed, unless he should give a certain notice of his application for a deed. A prior law provided that a tax deed should be conclusive evidence of the regularity of all proceedings "from the assessment by the assessor inclusive up to the execution of the deed." It was held that such a deed was not evidence of the giving of the notice required by the subsequent act.² A statute which imposed a penalty upon whoever should transact business without a license, where a license is required by law, was held to embrace cases where the license was required by a subsequent law.³ In the case referred to it is held that the language of a statute is generally extended to new things which the language of the act is sufficient to comprehend, although such things were not known and could not have been contemplated by the legislature when the act was passed.⁴ An Illinois statute passed before the creation of the appellate courts of that state provided that no judgment should be reversed in the supreme court for mere error in form, if the judgment was for the true amount of debt or damages. The statute was held to apply to the appellate courts thereafter created. The court says: "There is no doubt that this enactment of the legislature, made before the organization of the appellate

Commissioners, 7 Utah, 279, 26 Pac. 577; Jackson v. Kittle, 34 W. Va. 207, 12 S. E. 484; American Net & Twine Co. v. Worthington, 141 U. S. 468, 12 S. C. Rep. 55, 35 L. Ed. 821. See *Ex parte Ah Hoy*, 23 Ore. 89, 31 Pac. 220.

² *Herrick v. Niesz*, 16 Wash. 74, 47 Pac. 414.

³ *Daniels v. State*, 150 Ind. 348, 50 N. E. 74. See also *Nations v. State*, 64 Ark. 467, 43 S. W. 396; *State v. Dohney*, 72 Vt. 260, 47 Atl. 735.

⁴ *Daniels v. State*, 150 Ind. 348, 50 N. E. 74, citing *State v. Kirk*, 74 Ind. 554; *Mercer v. Corbin*, 117 Ind.

450, 10 Am. St. Rep. 76; *State v. Buskirk*, 18 Ind. App. 629, 48 N. E. 872; *United States v. Nichols*, 27 Fed. Cas. No. 15,880; *United States v. Bonton*, 24 Fed. Cas. No. 14,534; *State v. Hays*, 78 Mo. 600; *Campbell v. People*, 8 Wend. 636; *State v. Becton*, 7 Baxter, 138; *Graves v. Ashford*, L. R. 2 C. P. 410; *Gambart v. Ball*, 14 C. B. (N. S.) 306; *Taylor v. Goodwin*, 4 Q. B. D. 228; *Collier v. Worth*, L. R. 1 Exch. 464; *Attorney-General v. Saggors*, 1 Price, 182; *Williams v. Drewe*, Willes, 392; *In re Lloyd*, 51 Kan. 501, 33 Pac. 307.

court, is sufficiently broad in its scope, and elastic in its terms, to include any courts thereafter to be created, and given part of the functions which were exercised by the supreme court when the enactment went into operation.”⁵

A pure drug law forbid the sale of adulterated drugs and declared that an article should be deemed to be adulterated, if below the standard of quality, strength or purity laid down in the United States Pharmacopoeia. The statute was held to refer to the edition of the Pharmacopoeia in use at the time of its passage, and that drugs were not adulterated if up to the standard of that edition, though they might be below the requirements of a later edition.⁶

⁵ *Coats v. Barrett*, 49 Ill. App. 275, 277.

⁶ *State v. Emery*, 55 Ohio St. 364, 45 N. E. 319.

CHAPTER XIV.

STRICT CONSTRUCTION.

§ 517 (346). **Literal and strict construction compared.** Statutes are seldom written in such precise and categorical terms as to point out inclusively and exclusively all their intended applications. General and more or less flexible language is used. It is construed with reference to the subject of the act, its purpose; and popular words are read and understood according to their common acceptation.¹ And if technical words are used they are construed according to their technical sense.² There are many statutes of divers kinds which are strictly construed. And there is a great variety of other statutes which are remedial in their nature and are liberally construed. The statutes which are thus classified for strict or liberal construction include a large part of the legislation of every state. The same language may have a broader scope and effect for remedial purposes than under the restraining influence of considerations which induce strict construction. In the case of *Bones v. Booth*³ construction was given to the phrase "a single sitting" of a loser at play. The statute gave him a right for a limited time to recover his losses above 10*l.* at "a single sitting;" and gave an informer, afterwards, the right to recover them and treble value besides. As to the loser the statute was held remedial, and the losses those of a single sitting, though suspended for dinner; but as to the inform-

¹ *De Veaux v. De Veaux*, 1 Strob. Eq. 283; *ante*, §§ 394-401. *Bank*, 5 Ark. 536, 41 Am. Dec. 105; *Merchants' Bank v. Cook*, 4 Pick. 405; *United States v. Breed*, 1 Sumn. 159, Fed. Cas. No. 14,638; *Elliott v. McCool v. Smith*, 1 Black, 459, 17 L. Ed. 218; *Buckner v. Real Estate*

Opinion of Justices, 7 Mass. 523; *Swartwout*, 10 Pet. 137, 9 L. Ed. 373. ² *W. Black*. 1226.

er's right, the statute was penal, and the suspension for dinner broke the continuity of the sitting.

§ 518 (347). Strict construction is not a precise but a relative expression; it varies in degree of strictness according to the character of the law under construction. The construction will be more or less strict according to the gravity of the consequences flowing from the operation of the statute or its infraction; if penal, the severity of the penalty;⁴ if in derogation of common right, or capable of being employed oppressively, the extent and nature of the innovation and the consequences; and in any case, according to the combined effect and the reciprocal influence of all relevant principles of interpretation.⁵ A remedial statute, not clear as to any proposed application, admits of resort to many rules of construction to determine what the courts are authorized to assume is the meaning and intention of the law-maker.⁶ But a statute which must, on account of its subject or nature, be construed strictly, as the phrase is, must be read without expansion beyond its letter, without recourse to any such rules; it is to be confined to such subjects or applications as are obviously within its terms and purpose. In other words, a strict construction is a close and conservative adherence to the literal or textual interpretation.⁷

In speaking of the rule of strict construction the supreme court of the United States, in a recent case, says: "We recognize the force and salutary character of the rule, but it must not be misunderstood. It is not a substitute for all other rules. It does not mean that when a controversy is

⁴ *Commonwealth v. Fisher*, 17 Mass. 46, 49; *Taylor v. United States*, 3 How. 197, 210, 11 L. Ed. 559. *State*, 31 Tex. 571; *Andrews v. United States*, 2 Story, 208, Fed. Cas. No. 381; *United States v. Bassett*, 2 Story, 389, Fed. Cas. No. 14,539; *State v. Graham*, 38 Ark. 519; *Watervliet T. Co. v. McKean*, 6 Hill, 616; *Melody v. Reab*, 4 Mass. 473; *Schooner Enterprise*, 1 Paine, 32, Fed. Cas. No. 4499.

⁵ See *Chapin v. Persse & Brooks Paper Works*, 30 Conn. 461, 79 Am. Dec. 263.

⁶ *Post*, §§ 595-621.

⁷ *Austin v. State*, 71 Ga. 595; *Bettis v. Taylor*, 8 Port. 564; *Jordt v.*

or can be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the meaning of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we cannot concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them — to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute.”⁸

§ 519 (348). The rule of strict construction is not violated by permitting the words of a statute to have their full meaning. The letter of remedial statutes may be extended to include cases clearly within the mischief they were intended to remedy, unless such construction does violence to the language used; but consideration of the old law, the mischief, and the remedy, are not enough to bring cases out of the terms within the purview of a penal statute. They must be expressly included in the words of the statute. This is all the difference between a liberal and a strict construction of a statute. A case may come within one unless the language excludes it, while it is excluded by the other unless the language includes it.⁹ In *Attorney-General v. Sillem*, Pollock, C. B., said: “We cannot and ought not to deal with it as a crime, unless it is plainly and without doubt included in the language used by the legislature.”¹⁰ In another case¹¹ he said: “Although the common distinction taken between penal acts and remedial acts, that the former are to be construed strictly and the others are to be construed liberally, is not a distinction, perhaps, that ought to be erased from the mind of a judge,” yet the distinction

⁸ *Citizens' Bank v. Parker*, 192 U. S. 73.

¹⁰ 2 H. & C. 431, 514.

⁹ *State v. Powers*, 36 Conn. 77.

¹¹ *Nicholson v. Fields*, 31 L. J. Ex. 235; 7 H. & N. 810, 817.

now means little more than "that penal statutes, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment, the court refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other equally refusing by any mere verbal nicety, or forced consideration or equitable interpretation, to exonerate parties plainly within their scope."¹² Strict construction is not the exact converse of liberal construction, for it does not consist in giving words the narrowest meaning of which they are susceptible.¹³ And a late writer adds: What is meant by it is that acts of this kind — those which are to be strictly construed — are not to be regarded as including anything which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the legislature.¹⁴

§ 520 (349). **Strict construction of penal statutes.**— The penal law is intended to regulate the conduct of people of all grades of intelligence within the scope of responsibility. It is therefore essential to its justice and humanity that it be expressed in language which they can easily com-

¹² *Attorney-General v. Sillem*, 2 H. & C. 531; *Foley v. Fletcher*, 28 L. J. Ex. 106; 3 H. & N. 769.

¹³ *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740.

¹⁴ *Wilberforce*, St. L. 246; *Britt v. Robinson*, L. R. 5 C. P. 513, 514; *East India Interest*, 3 Bing. 196; *Partington v. Attorney-General*, L. R. 4 H. L. 122. In *Nicholson v. Fields*, 7 H. & N. 817, *Pollock, C. B.*, said: "I admit that the common distinction between penal and remedial acts, viz., that the one is to be construed strictly, the other liberally, ought not to be erased from the mind of a judge; yet whatever be the act, be it penal,

and certainly if remedial, we ought always to look for its true construction. In that respect there ought to be no distinction between a penal and a remedial statute. If the remedial statute does not extend to the particular matter under consideration, we have no power to legislate so as to extend it. Undoubtedly we are thus far bound to a strict construction in a penal statute, that if there be a fair and reasonable doubt, we must act as in revenue cases, where the rule is that the subject is not to be taxed without clear words for that purpose."

prehend; that it be held obligatory only in the sense in which all can and will understand it. And this consideration presses with increasing weight according to the severity of the penalty.¹⁵ Hence every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation;¹⁶ and every provision intended for the benefit of the accused, for the same humane reason, receives the most favorable construction.¹⁷ "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the law-maker must govern in the construction of penal as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is the modification of the ancient maxim, and amounts to this: that though penal laws are to be construed

¹⁵ Bish. Writ. L., §§ 193, 199; Commonwealth v. Fisher, 17 Mass. 49; Commonwealth v. Snelling, 4 Binn. 379; United States v. Moulton, 5 Mason, 537, Fed. Cas. No. 15,827; State v. Wilcox, 3 Yerg. 278; Schooner Enterprise, 1 Paine, 32, Fed. Cas. No. 4499; Randolph v. State, 9 Tex. 521; Chicago, etc. R. R. Co. v. People, 67 Ill. 11.

¹⁶ Id.

¹⁷ Commonwealth v. Keniston, 5 Pick. 420; United States v. Ragsdale, Hempst. 497, Fed. Cas. No. 16,113; Heward v. State, 13 Sm. & M. 261; Sneed v. Commonwealth, 6 Dana, 338; Dull v. People, 4 Denio, 91; State v. Wheeler, 23 Nev. 143, 44 Pac. 430. Spencer, J., said in Sickles v. Sharp, 13 John. 497: "The

rule that penal statutes are to be construed strictly when they act on the offender and inflict a penalty admits of some qualification. In the construction of statutes of this description it has been often held that the plain and manifest intention of the legislature ought to be regarded. A statute which is penal as to some persons, provided it is beneficial generally, may be equitably construed." State v. Canton, 43 Mo. 48, 52. Forfeitures are not favored, and courts incline against them. Where a statute may be construed so as to give a penalty, and also so as to withhold the penalty, it will be given the latter construction. Renfroe v. Colquitt, 74 Ga. 619.

strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature.¹⁸ The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. When there is no ambiguity in the words there is no room for construction. The case must be a very strong one indeed which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason and mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because of equal atrocity, or of a kindred character, with those which are enumerated."¹⁹

That penal statutes are to be strictly construed has become a maxim of the law, affirmed and illustrated by innumerable cases.²⁰ "The established rule is," says the court in *Ex parte*

¹⁸ *Walton v. State*, 62 Ala. 197; *Bing*, 580; *Hintermister v. First Nat. Bank*, 64 N. Y. 212; *United States v. Huggett*, 40 Fed. Rep. 636.
¹⁹ *Postal Tel. Co. v. Lenoir*, 107 Ala. 640, 18 So. 266; *State v. Sanford*, 67 Conn. 286, 34 Atl. 1045; *Alabama Great So. R. R. Co. v. Fowler*, 104 Ga. 148, 30 S. E. 243; *Hutchinson v. Davis*, 58 Ill. App. 358; *Kruse v. Kennett*, 69 Ill. App. 566; *Saloman v. People*, 89 Ill. App. 374; *Goodman v. People*, 90 Ill. App. 533; *State Board of Health v. Ross*, 91 Ill. App. 281; *Pierce v. Dillingham*, 96 Ill. App. 300; *Long v. People*, 109 Ill. App. 197; *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583;

¹⁹ *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37. See *Jenkinson v. Thomas*, 4 T. R. 665; *Rex v. Handy*, 6 id. 286; *Warne v. Varley*, id. 443; *Martin v. Ford*, 5 id. 101; *Fletcher v. Lord Sondes*, 3

Bailey,²¹ "that a penal law must be construed strictly, and according to its letter. Nothing is to be regarded as included within them that is not within their letter as well as their spirit; nothing that is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the legislature. And where a statute of this kind contains such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred."

§ 521 (350). A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and policy, of the law.²² "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and

McMasters v. Burnett, 92 Ky. 358, 17 S. W. 1031; Attorney-General v. Pitcher, 183 Mass. 513, 67 N. E. 606; State v. Alabama, etc. Ry. Co., 67 Miss. 647, 7 So. 502; West v. State, 70 Miss. 598, 12 So. 903; State v. McCance, 110 Mo. 398, 19 S. W. 648; St. Charles v. Hackman, 133 Mo. 634, 34 S. W. 878; State v. Gritzer, 134 Mo. 512, 36 S. W. 39; State v. Peterson, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; Duff v. Karr, 91 Mo. App. 16; State v. Hayes, 13 Mont. 116, 32 Pac. 415; McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616; McCormick Harvesting Machine Co. v. Mills, 64 Neb. 166, 89 N. W. 621; People v. Rosenberg, 138 N. Y. 410, 34 N. E. 285; Marriner v. Roper Company, 112 N. C. 164, 16 S. E. 906; Cleveland, C. & St. L. Ry. Co. v. Wells, 65 Ohio St. 313, 62 N. E. 332; Miller v. Toledo Grain & Milling Co., 21 Ohio C. C. 325; Klein v. Livingston Club, 177 Pa. St. 224, 35 Atl. 606, 55 Am. St. Rep. 717, 34 L. R. A. 94; Holman v. Frost, 26 S. C. 290, 2 S. E. 16; Hall v. Norfolk & W. R. R. Co., 44 W. Va. 36, 28 S. E. 754; People v. Dolan, 5 Wyo. 245, 39 Pac. 752; United States v. Wilson, 58 Fed. 768; Smith v. Wood, L. R. 24 Q. B. D. 23; McLoughlin v. Raphael Tuck Co., 191 U. S. 267.

²¹ 39 Fla. 734, 743, 23 So. 552.

²² State v. Lovell, 23 Iowa, 304; People v. Peacock, 98 Ill. 172; Lair v. Killmer, 25 N. J. L. 522; Merrill v. Melchior, 30 Miss. 516; Foote v. Vanzandt, 34 id. 40; Andrews v. United States, 2 Story, 203, Fed. Cas. No. 381; Shaw v. Clark, 49 Mich. 384, 43 Am. Rep. 474; Hall v. State, 20 Ohio, 7, 16; Van Buren v. Wylie, 56 Mich. 501, 23 N. W. 195; Graff v. Evans, L. R. 8 Q. B. Div. 377; Haynie v. State, 32 Miss. 400; Attorney-General v. Pitcher, 183 Mass. 513, 67 N. E. 606.

that no act, however wrongful, can be punished under such a statute unless clearly within its terms.”²³ Although a case may be within the mischief intended to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language.²⁴ And as a general rule where a penalty is affixed by a statute to an act or omission, such penalty is the only punishment or loss incurred by the guilty party.²⁵ To constitute the offense the act must be both within the letter and spirit of the statute defining it.²⁶ Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms.²⁷ “Constructive crimes — crimes built up by courts with the aid of inference, implication, and

²³ *Todd v. United States*, 158 U. S. 278, 15 S. C. Rep. 889, 39 L. Ed. 982. And in *State v. Woodruff*, 68 N. J. L. 89, 93, 52 Atl. 294, the court says: “Penal statutes must be construed strictly and must not be extended by what the court may believe must have been the legislative intent. We must find the intent in the act making the offense, and the offense clearly defined, to justify an indictment founded upon a statute.”

²⁴ *United States v. Sheldon*, 2 Wheat. 119, 4 L. Ed. 199.

²⁵ *In re International Patent P. etc. Co.*, 37 L. T. (N. S.) 351; L. R. 6 Ch. Div. 556.

²⁶ *Lair v. Killmer*, 25 N. J. L. 522; *Britt v. Robinson*, L. R. 5 C. P. at pp. 513, 514; *Dewey v. Goodenough*, 56 Barb. 54; *East India Interest*, 3 Bing. at p. 196; *Ex parte Bailey*, 39 Fla. 734, 23 So. 552; *Hanks v. Brown*, 79 Iowa, 560, 44 N. W. 811; *Connell v. Western Union Tel. Co.*, 108 Mo. 459, 18 S. W. 883; *Rixhe v. Western*

Union Tel. Co., 96 Mo. App. 406, 70 S. W. 265; *State v. Hayes*, 13 Mont. 116, 32 Pac. 415; *State v. Meyers*, 56 Ohio St. 340, 47 N. E. 138; *Commonwealth v. Gouger*, 21 Pa. Supr. Ct. 217; *Barkley v. State*, 28 Tex. Ct. App. 99, 12 S. W. 495.

²⁷ *People v. Peacock*, 98 Ill. 172; *Hall v. State*, 20 Ohio, 8; *Grooms v. Hannon*, 59 Ala. 510; *Southwestern R. R. Co. v. Cohen*, 49 Ga. 627; *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740; *The Schooner Harriet*, 1 Story, 251, Fed. Cas. No. 6099; *State v. Graham*, 38 Ark. 519; *Foster v. Rhoads*, 19 John. 191; *Ex parte McNulty*, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257; *Robinson v. People*, 23 Colo. 123, 46 Pac. 676; *Waggaman v. District of Columbia*, 16 App. Cas. (D. C.) 207; *State v. Reid*, 125 Mo. 43, 28 S. W. 172; *State v. Gritznier*, 134 Mo. 512, 36 S. W. 39; *France v. United States*, 164 U. S. 676, 17 S. C. Rep. 219, 41 L. Ed. 595.

strained interpretation — are repugnant to the spirit and letter of English and American criminal law.”²⁸ All doubts as to construction are resolved in favor of the defendant.²⁹ Where an act prohibited the sale of intoxicating liquors in the vicinity of certain manufacturing establishments in three named counties, it was held to have application only to such establishments as were then in being.³⁰ It is a principle in the construction of statutes that the legislature does not intend the infliction of punishment, or to interfere with the liberty or rights of the citizen, or to grant exceptional powers, privileges or exemptions by doubtful language; but will in such cases express itself clearly, and intends no more than it so expresses.³¹ Abbott, J., said: “It would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty when the express words of the act of parliament do not authorize it.”³² This strictness does not exclude accessories before the fact, though not named in the statute.³³ Nor does it preclude the application of common sense to the terms made use of in the statute to avoid an absurdity which the legislature ought not to be presumed to have intended.³⁴ The rule is not violated by adopting the sense of the words which best harmonize with the object and intent of the legislature.³⁵ Though a statute may be of a class which must be construed strictly, it is nevertheless to be so construed as to effect the intention of the legislature. Effect is to be given to the plain meaning of the language, and strict construction is to be applied

²⁸ *Ex parte McNulty*, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257.

²⁹ *State v. Walsh*, 43 Minn. 444, 45 N. W. 721; *State v. Krueger*, 134 Mo. 262, 35 S. W. 604; *People v. Tanner*, 128 N. Y. 416, 28 N. E. 364; *State v. Beck*, 21 R. I. 288, 43 Atl. 366, 45 L. R. A. 269.

³⁰ *Hall v. State*, 20 Ohio, 8; *United States v. Paul*, 6 Pet. 141, 8 L. Ed. 348.

³¹ 4 Inst. 332.

³² *Rex v. Bond*, 1 B. & Ald. at p. 392.

³³ *Walton v. State*, 62 Ala. 197.

³⁴ *Commonwealth v. Loring*, 8 Pick. 373; *House v. House*, 5 Har. & J. 125; *Smith v. State*, 17 Tex. 191.

³⁵ *State v. Indiana, etc. R. R. Co.*, 133 Ill. 69, 32 N. E. 817, 18 L. R. A. 502.

only where the effect is reasonably open to question.³⁶ The rule that penal statutes are to be construed strictly is not violated by allowing their words to have their full meaning, or even the more extended of two meanings, where such construction better harmonizes with the context.³⁷ Statutes imposing penalties for the invasion of the rights of the citizen are not subjects of disfavor in the law, and are not construed with the same strictness as those which regulate or restrain the exercise of a natural right, or forbid the doing of things not intrinsically wrong.³⁸

§ 522 (351). A few cases will be given illustrative of the principle of strict construction: Driving cattle was held not within the true meaning of an act prohibiting their transportation.³⁹ A statute which provides a penalty for resisting an officer "in serving or attempting to execute any legal writ, rule, order or process whatever," does not embrace the case of resisting an officer who was attempting to arrest, without any warrant, writ or process of any kind, a person who was breaking the public peace.⁴⁰ A penalty provided against a mortgagee for failing to discharge a paid mortgage cannot be extended to the assignee of a mortgage.⁴¹ When either of two constructions can be given to a statute and one of them involves a forfeiture, the other is to be preferred.⁴² In a penal act the word "and" cannot be read as "or."⁴³ The expression "this act" cannot be taken to include another act *in pari materia*.⁴⁴ The words "domestic distilled spirits" in an inspection law containing a penalty or forfeiture were construed to mean spirits distilled

³⁶ *Wilson v. Wentworth*, 25 N. H. 247; *Bolles v. Outing Co.*, 175 U. S. 262, 20 S. C. Rep. 94, 44 L. Ed. 156.

³⁷ *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830.

³⁸ *Peonage Cases*, 123 Fed. 671, 676.

³⁹ *United States v. Sheldon*, 2 Wheat. 119, 4 L. Ed. 199.

⁴⁰ *State v. Lovell*, 23 Iowa, 304.

⁴¹ *Grooms v. Hannon*, 59 Ala. 510.

⁴² *Vattel's 20th Rule of Construction*; *Farmers', etc. Nat. Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196; *Renfroe v. Colquitt*, 74 Ga. 619.

⁴³ *United States v. Ten Cases of Shawls*, 2 Paine, 162, Fed. Cas. No. 16,448.

⁴⁴ *Rex v. Trustees, etc.*, 5 Ad. & E. 563.

within the state, and this as matter of law, not to be modified by any proof of usage giving it a broader scope. It was held also not to include spirits rectified there but manufactured in another state.⁴⁵ A statute prescribing a penalty for "any officer taking greater or other fees" than are expressed in the fee-bill was held not applicable to any person out of office for services while in office.⁴⁶ The word "sale" in a penal statute does not include an *exchange*.⁴⁷ A statute making punishable "the offense of insurrection or an attempt at insurrection" does not by these words apply to an attempt to incite insurrection.⁴⁸ In the construction of an act imposing penalties upon gambling, it was held that half-pennies tossed up at a game called toss did not come within the words "instruments of gaming;"⁴⁹ that deposit of half a sovereign as a bet on a dog race was not "betting with a coin as an instrument of gaming at a game of chance."⁵⁰ A statute forbade an alderman to be clerk to the justices in any borough, and forbade the clerk to the justices in any borough to be directly or indirectly interested in any prosecution. A penalty by the same section was imposed on any person, being an alderman, who should act as clerk to the justices of a borough or should otherwise offend in the premises. The defendant was clerk to the justices, and had done the prohibited act; he had been interested in a prosecution; but it was held that the penalty clause only applied to those who are in the offices there specified, among which the clerk to the justices was not included. The court adhered to the grammatical construction. Coleridge, J., said: "There are two distinct prohibitory provisos, and it is quite obvious that the intention was to annex the penalty to the violation of each. But this cannot be done if a grammatical construction be given to the words used. The only

⁴⁵ Commonwealth v. Giltinan, 64 Pa. St. 100.

⁴⁶ Gibson v. State, 38 Ga. 571.

⁴⁷ Gallagher v. Neal, 3 P. & W. 183.

⁴⁸ Watson v. Martin, 34 L. J. M. C. 50.

⁴⁹ Hirst v. Molesbury, L. R. 6 Q. B. 130.

⁵⁰ Gunter v. Leckey, 30 Ala. 591.

way in which it can be done is by inserting . . . the words 'any person who' before 'shall otherwise offend.' But I never heard that it was allowable to insert words for the purpose of extending a penal clause."⁵¹

§ 523 (352). A statute provided that "all notes or conveyances whatever, in which the consideration shall be for any money or goods won by playing at cards, dice, or any other game whatever, or by betting on the sides or hands of such as are gaming, or by any betting or gaming whatever, shall be void and of no effect."⁵² . . . In *Shaw v. Clark*⁵³ the question was whether a deal in "options" was within the statute. The court by Cooley, J., said: "In common speech gaming is applied to play with stakes at cards, dice or other contrivance, to see which shall be the winner and which the loser. A contract for the purchase of options is not gaming within this meaning of the term. In form it is the purchase and sale of a commodity to be delivered at a future day, and it only resembles gaming in that the parties take a chance of gain or loss without intending that the sale which they nominally make shall ever become a legitimate business transaction. Betting in common speech means the putting of a certain sum of money or other valuable thing at stake on the happening or not happening of some uncertain event. A purchase of options is not betting in this sense, though it resembles it in the fact that risks are taken on uncertain events, and that the tendency to those engaged in it is demoralizing. The statute in terms forbids betting and gaming, and it contains penal provisions for the punishment of those who engage in them; but penal statutes are not enlarged by intendment, and acts not expressly forbidden by them cannot be reached merely because of their resemblance, or because they may be equally and in the same way demoralizing and injurious."⁵⁴ Those who contend that a penalty may be inflicted must show

⁵¹ *Coe v. Lawrence*, 1 E. & B. 516.

⁵⁴ See *Smith v. State*, 17 Tex. 191;

⁵² Sec. 1996, Comp. Laws of Mich. *State v. Rorie*, 23 Ark. 726.

⁵³ 49 Mich. 384, 43 Am. Rep. 474.

that the words of the act distinctly express that under the circumstances it has been incurred. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.⁵⁵

§ 524 (353). There is a like close interpretation whether, as in the preceding instances, the provision relates to the elements of the offense, or concerns the penalty or the procedure.⁵⁶ Where the penalty for a certain offense was that the convict should lose his right hand, he could not be adjudged to lose his left hand, the right hand having before been cut off.⁵⁷ An act was silent on the place of imprisonment, and as between different places at which, under proper conditions, imprisonment could be adjudged, it was held that it must be at the place which will be the lesser punishment rather than the severer — with those convicted of misdemeanors, rather than with those convicted of higher crimes.⁵⁸ But where an act is declared to be a felony, the imprisonment must be in the penitentiary, though the act is silent as to the place of imprisonment.⁵⁹ Nor can a statute be extended beyond its grammatical sense or natural meaning on any plea of the failure of justice.⁶⁰ If the statute is ambiguous, the construction adopted should be that most favorable to the accused.⁶¹ Courts are authorized to inquire into and carry out the manifest intention of the legislature; but if there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a court not to inflict the penalty.⁶²

⁵⁵ Brett, J., in *Dickenson v. Pac.* 553; *United States v. Powers*, 1 Alaska, 180.
Fletcher, L. R. 9 C. P. 7; *The Gauntlet*, L. R. 4 P. C. 191.

⁵⁹ *In re Pratt*, 19 Colo. 138, 34

⁵⁶ *Rex v. Hymen*, 7 T. R. 536; *Pac.* 680.
Walwin v. Smith, 1 Salk. 177; *Partridge v. Naylor*, Cro. Eliz. 480;
Commonwealth v. Keniston, 5 Pick. 420.

⁶⁰ *Remington v. State*, 1 Ore. 281.

⁶¹ *The Schooner Enterprise*, 1 Paine, 32, Fed. Cas. No. 4499; *Commonwealth v. Martin*, 17 Mass. 359.

⁵⁷ *Dwarris*, 634.

⁶² *In Schooner Enterprise*, 1 Paine,

⁵⁸ *Horner v. State*, 1 Ore. 267; *32, Fed. Cas. No. 4499*, *Livingston v. People*, 14 Colo. 413, 24

ston, J., said: "The act, and par-

§ 525. A statute which forbade the loaning of public funds was held to use the word "loan" in its popular sense, and a deposit of such money in a bank was held not to be within the statute.⁶³ A fence was held not to be a "structure" within a statute which imposed a penalty upon any person "who displaces, removes, injures or destroys a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or structure," attached or appurtenant to or connected with a railway.⁶⁴ A statute provided that whoever, being charged with the collection, receipt, safe keeping, transfer or disbursement of the public money converts the same to his own use should be

ticularly that part of it under which a forfeiture is claimed, is highly penal, and must therefore be construed as such laws always have been and ever should be. But while it is said that penal statutes are to receive a strict construction, nothing more is meant than that they shall not, by what may be thought their spirit or equity, be extended to offenses other than those which are specially and clearly described and provided for. A court is not, therefore, . . . precluded from inquiring into the intention of the legislature. However clearly a law may be expressed, this must ever, more or less, be a matter of inquiry. A court is not, however, permitted to arrive at this intention by mere conjecture, but it is to collect it from the object which the legislature had in view, and the expressions used which should be competent and proper to apprise the community at large of the rule which it is intended to prescribe for their government. For although ignorance of the existence of a law be no excuse for its viola-

tion, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case when he labors under the same uncertainty as to the meaning of the legislature." *Wright v. Bolles Woodenware Co.*, 50 Wis. 167, 6 N. W. 508; *United States v. One Hundred Barrels of Spirits*, 2 Abb. (U. S.) 305, Fed. Cas. No. 15,948; *United States v. Fifty-six Barrels of Whiskey*, 1 Abb. (U. S.) 93, Fed. Cas. No. 15,095; *United States v. Garrelson*, 42 Fed. 22.

⁶³ *Moulton v. McLean*, 5 Colo. App. 454, 39 Pac. 78; *Davis v. Dunlevy*, 11 Colo. App. 344, 53 Pac. 250, 1130.

⁶⁴ *State v. Walsh*, 43 Minn. 444, 45 N. W. 721.

deemed guilty of embezzlement. The court held that it did not include a deputy county treasurer; that it could not by construction include persons not within the description of the statute, though within the reason of it.⁶⁵ An act made the officers of banking institutions criminally liable for receiving deposits when the bank was in a failing condition. It was held that the statute could not be extended to cases or persons not clearly within its terms, and that it did not include private bankers,⁶⁶ or the officers of trust companies, which companies exercised many functions of banks but had no power to receive money on general deposit, and that it made no difference that such companies did in fact receive such deposits.⁶⁷ A statute forbade pawnbrokers to take or receive more than twenty-five per cent. per annum. To charge or demand more was held to be no violation.⁶⁸ A statute which imposes a penalty upon telegraph and telephone companies for failure to transmit a message promptly, impartially and in good faith does not cover a failure to deliver, after transmission to the place of its destination.⁶⁹ Where the statute imposes a penalty for failure to deliver a message to the addressee, if he resides within one mile of the office, it was held not to apply to transients.⁷⁰ Such statutes are strictly construed.⁷¹ A statute to regulate the transportation of live stock imposed a penalty upon any company, owner or custodian of such animals who knowingly and willingly failed to comply with the act. The rule of strict construction was held to exclude receivers of railroads from the operation of the act.⁷² An act made it penal

⁶⁵ *State v. Meyers*, 56 Ohio St. 340, 47 N. E. 138.

⁶⁶ *State v. Kelsey*, 89 Mo. 623, 1 S. W. 838.

⁶⁷ *State v. Reid*, 125 Mo. 43, 28 S. W. 172.

⁶⁸ *Hollenback v. Getz*, 63 Conn. 385, 28 Atl. 519.

⁶⁹ *Dudley v. Western Union Tel. Co.*, 54 Mo. App. 391. But see *Bier-*

nett v. Telegraph Co., 39 Mo. App. 599; *Brashears v. Telegraph Co.*, 45 Mo. App. 453.

⁷⁰ *Moore v. Western Union Tel. Co.*, 87 Ga. 613, 13 S. E. 639.

⁷¹ *Langley v. Western Union Tel. Co.*, 88 Ga. 777, 15 S. E. 291.

⁷² *United States v. Harris*, 177 U. S. 305, 20 S. C. Rep. 609, 44 L. Ed. 780.

to bet on the result of any election held in the state. A presidential election was held not to be within the act.⁷³ A statute made it penal for any laborer, renter or share-cropper, who has contracted with another for a specified time in writing, to *leave* his employer or the leased premises without consent before the expiration of the contract. The act was held not to apply to one who made the contract but had never entered upon the employment or possession.⁷⁴ A statute imposed a penalty for selling any spirituous liquors or wine to any Indian. The sale of lager beer was held not to be within the statute, though it might be within the same reason and policy.⁷⁵ A statute made it unlawful for any person to sell or deal in tickets issued by any railroad company, unless he was a duly authorized agent of the company. It was held to be aimed at the business of buying and selling such tickets, and the sale of a single ticket was held not to be within the statute.⁷⁶ A statute which made it penal to carry arms on election day within half a mile of a polling place was held not to apply to one who did so in self-defense, or to protect a relative in imminent danger.⁷⁷ A social club open only to members was held not to be a tipping house within a statute as to keeping open on Sunday.⁷⁸ So a sale by such a club to its members was held not to be a sale within the statute forbidding the sale of liquor.⁷⁹ So the loan of a bottle or measure of whisky in-

⁷³ Covington v. State, 28 Tex. Ct. App. 225, 14 S. W. 126.

⁷⁴ Hendricks v. State, 79 Miss. 368, 30 So. 708.

⁷⁵ Sarlls v. United States, 152 U. S. 570, 14 S. C. Rep. 720, 38 L. Ed. 556; In re McDonough, 49 Fed. 360.

⁷⁶ State v. Ray, 109 N. C. 736, 14 S. E. 83, 14 L. R. A. 529.

⁷⁷ Barkley v. State, 28 Tex. Ct. App. 99, 12 S. W. 495. The following are additional illustrations of the strict construction of penal statutes: In re Wood, 82 Mich. 75,

45 N. W. 1113; State v. Chandler, 132 Mo. 155, 33 S. W. 797, 53 Am. St. Rep. 483; State v. Howard, 137 Mo. 289, 38 S. W. 908; State v. Hegeman, 2 Penn. (Del.) 147, 44 Atl. 621; Cochran v. State, 36 Tex. Crim. App. 115, 35 S. W. 968.

⁷⁸ Mohrman v. State, 105 Ga. 709, 32 S. E. 143, 70 Am. St. Rep. 74, 43 L. R. A. 398.

⁷⁹ Klein v. Livingston Club, 177 Pa. St. 224, 35 Atl. 606, 55 Am. St. Rep. 717, 34 L. R. A. 94.

good faith to be returned in kind is not a sale within such a statute.⁸⁰

§ 526 (354). A penal statute should be construed to carry out the obvious intention of the legislature, and be confined to that. Every case must come not only within its letter but within its spirit and purpose; but it should be given a rational construction. There must generally be such an act or omission as implies an actual and conscious infraction of duty. A law which condemns to capital punishment one who strikes his father would not be held applicable to one who has shaken and struck his father to arouse him from a lethargic stupor.⁸¹ Where the master of a steamboat was subjected to a penalty for failing to deliver any letter which should be left "in his care or within his power," it was held that there must be knowledge of this fact, and mere possession by the clerk of the boat was not enough.⁸² If notice is required to impose a duty, the neglect of which is punishable, it must be actual notice, and personally served.⁸³ Although to an absolute and sweeping prohibition of the sale of intoxicating liquors, the courts may not imply an exception when sold as a prescription for medicine,⁸⁴ it was said by the court in one case:⁸⁵ "We are not to be supposed as intimating that physicians and druggists would be prohibited under such a statute . . . from the *bona fide* use of spirituous liquors in the necessary compounding of medicines manufactured, mixed or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactments, nor even within the strict letter of the statute." A statute imposed a penalty upon the owner, agent, lessee, or occupant of any building from the smoke-

⁸⁰ Robinson v. State, 59 Ark. 341, 27 S. W. 233; Skinner v. State, 97 Ga. 690, 25 S. E. 364.

⁸¹ Smith's Com., § 448.

⁸² United States v. Beaty, Hempst. 487, Fed. Cas. No. 14,555.

⁸³ St. Louis v. Goebel, 32 Mo. 295.

⁸⁴ Commonwealth v. Kimball, 24 Pick. 366; State v. Brown, 31 Me. 522; Woods v. State, 36 Ark. 36, 38 Am. Rep. 22; Carson v. State, 69 Ala. 235.

⁸⁵ Carson v. State, 69 Ala. 235.

stack or chimney of which there shall issue thick or dense black or gray smoke. It was held that the statute should be limited to such persons of the classes mentioned as had some agency in the production of the smoke.⁸⁶

§ 527 (355). In the very recent case of *Regina v. Tolson*⁸⁷ is, from the standpoint of English decisions, a very exhaustive and instructive discussion of the principle or maxim, *actus non facit reum, nisi mens sit rea*. The statute of 24 and 25 Vict., ch. 100, sec. 57, provides in these words: "Whoever, being married, shall marry any other person during the life of the former husband or wife, shall be guilty of felony, punishable with penal servitude for not more than seven years, or imprisonment with or without hard labor for not more than two years," with a proviso that "nothing in this act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time." The husband of the defendant deserted her the year following their marriage. She and her father subsequently made inquiries about him, and learned from his brother and from general report that he had been lost at sea. She married again five years after his desertion, and the question was considered whether a belief in good faith and on reasonable grounds that her husband was dead would be a good defense against the charge of bigamy in contracting the second marriage. It was decided in the affirmative. Wills, J., said: "There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past. It is, however, undoubtedly a principle of English criminal law, that, ordinarily speaking, a crime is not committed if the mind of

⁸⁶ *Moses v. United States*, 16 App. Cas. (D. C.) 428, 50 L. R. A. 532.

⁸⁷ L. R. 23 Q. B. Div. 168 (1889); S. C., 40 Alb. L. J. 250.

the person doing the act in question be innocent. 'It is a principle of natural justice and of our law,' says Lord Kenyon, C. J., 'that *actus non facit reum, nisi mens sit rea*. The intent and act must both concur to constitute the crime.'⁸⁸ The guilty intent is not necessarily that of intending the very act or thing done, and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed."⁸⁹

⁸⁸ *Fowler v. Padget*, 7 T. R. 509, 514.

⁸⁹ Wills, J., said, in continuing his opinion: "Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. By-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health or convenience, and such by-laws are enforced by the sanction of penalties, and the breach of them constitutes an offense and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the by-laws that the person committing

it had *bona fide* made an accidental miscalculation or an erroneous measurement. The acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, that if he fails to do so he does it at his peril.

"Whether an enactment is to be construed in this sense, or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable." Citing and comparing *Reg. v. Sleep*, L. & C. 44; 30 L. J. (M. C.) 170; *Hearne v. Garton*, 2 E. & E. 66; *Taylor v. Newman*, 4 B. & S. 89; *Watkins v. Major*, L. R. 10 C. P. 662; *Reg. v. Bishop*, 5 Q. B. Div. 259; *Bowman v. Blyth*, 7 E. & B. 26, 43; *Foster's*

Cave, J., said in the same case: "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. This doctrine is embodied in the somewhat uncouth maxim, '*actus non facit reum, nisi mens sit rea.*' Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. . . . So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication."⁹⁰

Crown Law (3d ed.), pp. 439, 440; *Rex v. Banks*, 1 Esp. 144; *Fowler v. Padget*, 7 T. R. 509; *Reg. v. Willmetts*, 3 Cox C. C. 281; *Reg. v. Cohen*, 8 id. 41; *Reg. v. O'Brien*, 15 L. T. (N. S.) 419; *Reg. v. Turner*, 9 Cox C. C. 145; *Reg. v. Horton*, 11 id. 670; *Reg. v. Gibbons*, 12 id. 237; *Reg. v. Prince*, L. R. 2 C. C. R. 154; *Reg. v. Bennett*, 14 Cox C. C. 45; *Reg. v. Moore*, 13 id. 544.

⁹⁰ In *Reg. v. Tolson*, L. R. 23 Q. B. D. 168, Stephen, J., said: "The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental

element of most crimes is marked by one of the words 'maliciously,' 'fraudulently,' 'negligently,' or 'knowingly;' but it is the general, I might, I think, say the invariable, practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity and some degree of freedom from some kinds of coercion, are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined. . . .

"With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained, that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration, can any one doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime, in a state of somnambulism, be entitled to be acquitted? And why is this? Simply because

A statute which gave treble damages for conversion of logs or lumber in certain cases, though broad enough to cover any conversion, was restrictively interpreted in pursuance of the assumed intention of the legislature to punish only wilful wrongdoing. It was held that "the evidence must satisfy the jury that the conversion was not only against the consent of the plaintiff, but was attended by circumstances of bad faith and intentional wrong in order

he would not know what he was doing. A multitude of illustrations might be given. I will mention one or two glaring ones. *Levet's Case*, 1 Hale, 474, decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, killed a person who was not a burglar, was held not to be a felon though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly *se defendendo*, which then involved certain forfeitures. In other words, he was in the same situation, as far as regarded the homicide, as if he had killed a burglar. In the decision of the judges in *Macnaghten's Case*, 10 C. & F. 200, it is stated that if, under an insane delusion, one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A *bona fide* claim of right excuses larceny, and many of the offenses against the malicious mischief act. Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that

state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offense. I am unable to suggest any real exception to this rule, nor has one ever been suggested to me. A very learned person suggested to me the following case: A constable, reasonably believing a man to have committed a murder, is justified in killing him to prevent his escape; but if he had not been a constable he would not have been so justified, but would have been guilty of manslaughter. This is quite true, but the mistake in the second case would be not only a mistake of fact, but a mistake of law on the part of the homicide in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected of murder. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter." See *State v. Bartlett*, 80 Me. 132; *The Brig William Gray*, 1 Paine, 16, Fed. Cas. No. 17,694; *United States v. Pearce*, 2 McLean, 14, Fed. Cas. No. 16,020; 1 Bish. C. L., §§ 226, 227.

to bring it within the penal provision.”⁹¹ A statute⁹² imposed a penalty on any person who should take, kill or have in his possession any partridges between the 1st of February and the 1st of September. It was held that a person having partridges in his possession between those two dates was not liable to the penalty if the partridges had been killed before the earliest day named, as otherwise a man might be liable to a penalty if he lawfully killed a partridge on the last moment of February 1, but had it in his possession on the first moment of February 2.⁹³ So where penalties were imposed upon bakers who used certain ingredients in bread,⁹⁴ upon persons sending dangerous goods by railway,⁹⁵ or being in possession of stores which bore the admiralty mark,⁹⁶ it was held that knowledge was essential to constitute any of these offenses.⁹⁷ A statute imposed a penalty on any voter receiving a reward “to give his vote” at an election. It was held that this penalty was not incurred by one who received a reward after he had voted.⁹⁸ A statute providing that a seaman should forfeit his wages by deserting his ship was held not to apply to one who was treated with such cruelty as justified him in refusing to remain on board.⁹⁹

Where a statute imposed a penalty upon one who went into or visited a gambling house, it was held not to apply to one who went there for a lawful purpose.¹ The court

⁹¹ *McDonald v. Montana Wood Co.*, 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616; *Kramer v. Goodlander*, 98 Pa. St. 353; *Cohn v. Neeves*, 40 Wis. 393; *Wallace v. Finch*, 24 Mich. 255; *State v. Baker*, 47 Miss. 95; *Mahoon v. Greenfield*, 52 id. 434.

⁹² 2 Geo. III., ch. 19, as amended by 39 Geo. III., ch. 34.

⁹³ *Simpson v. Unwin*, 3 B. & Ad. 134; *Wilb. on St.* 253; *People v. Allen*, 20 Misc. 120, 45 N. Y. S. 74.

⁹⁴ *Core v. James*, L. R. 7 Q. B. 135.

⁹⁵ *Hearne v. Garton*, 2 E. & E. 66.

⁹⁶ *Rex v. Sleep*, L. & C. 44. Compare *Lee v. Simpson*, 3 C. B. 871; *Rex v. Woodrow*, 15 M. & W. 404; *Reg. v. Harvey*, L. R. 1 C. C. 284; *Reg. v. Dean*, 12 M. & W. 39.

⁹⁷ *Wilb. on St.* 254.

⁹⁸ *Huntingtower v. Gardiner*, 1 B. & C. 297.

⁹⁹ *Edward v. Trevellick*, 4 E. & B. 59.

¹ *Ex parte Ah Hoy*, 23 Ore. 89, 31 Pac. 220.

says: "According to well settled and familiar rules for the construction of statutes, the subject-matter, effect and consequences, the object, reason and spirit of a statute, as well as its words, must be considered in interpreting and construing it. Under these rules a statute intending to prohibit a public offense will never be applied to an innocent or lawful act."

It has been held that, where a statute commands an act to be done or omitted, such as selling liquor to a minor, which is innocent but for the act, ignorance of the fact or state of things contemplated by the statute is no excuse.² Where an act makes knowledge an ingredient of the offense, it is held to mean actual, and not merely constructive, knowledge.³ A statute imposed a penalty upon any person if he wilfully committed any trespass by cutting down or destroying any timber, etc., on the land of another. In construing this statute the court said: "It is therefore uniformly held that the word 'wilful' in such statutes, not only means intentionally or deliberately done, but with a bad or evil purpose, as in violation of law, or wantonly and in disregard of the rights of others, or knowingly and of stubborn purpose, or contrary to a known duty, or without authority, and careless whether he have the right or not."⁴

§ 528 (356). Courts will not by the strict construction of penal statutes defeat the intention of the law-maker. Where the intent is plain it will be carried into effect. It will not be evaded or defeated on the principle of strict construction. The principle will be adhered to that the case must be brought within the letter and spirit of the enactment, but the intent of a criminal statute may be ascertained from a consideration of all its provisions, and that intent will be carried into effect. Such statutes will not be construed so strictly as to

²State v. Bruder, 35 Mo. App. R. A. 323; State v. White, 96 Mo. App. 34, 69 S. W. 684.

³Utley v. Hill, 155 Mo. 232, 55 S. W. 1091, 78 Am. St. Rep. 569, 49 L. R. 71 N. W. 421. See also State v. Grassle, 74 Mo. App. 313.

⁴Parker v. Parker, 103 Iowa, 500,

defeat the obvious intention and purpose of the legislature.⁵ "While all statutes pertaining to crimes and their punishment should be strictly construed, and nothing left to intendment, they should not be so construed as to thwart the evident will and intention of those who enacted them, where that intention is plainly and fairly deducible from the law itself."⁶ A penal statute should receive a reasonable and common sense construction,⁷ and "its force should not be frittered away by niceties and refinements at war with the practical administration of justice."⁸ The principle of strict construction does not allow a court to make that an offense which is not such by legislative enactment; but this does not exclude the application of common sense to the terms made use of in an act in order to avoid an absurdity which the legislature ought not to be presumed to have intended.⁹ This was said of a statute providing for the punishment of any person who should knowingly and wilfully receive, conceal or dispose of any human body or the remains thereof, which shall have been dug up, removed or carried away, etc., "not being authorized by the selectmen of any town in this commonwealth." The court said: "Taken strictly without reference to the subject-matter and the manifest intention and object of the legislature, it would appear that in order to sustain an indictment on the stat-

⁵ *Zellers v. White*, 208 Ill. 518; *Johnson v. Gram*, 72 Ill. App. 676; *State v. Hogriever*, 152 Ind. 652, 53 N. E. 921; *State v. Small*, 29 Minn. 216, 12 N. W. 703; *State v. Bishop*, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200; *State v. Sibley*, 131 Mo. 519, 33 S. W. 167; *State v. Foster*, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; *Gilbert v. Du-truit*, 91 Wis. 661, 65 N. W. 511; *ante*, § 520.

⁶ *State v. Bishop*, 128 Mo. 373, 384, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200.

⁷ *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176; *Walker v. Dailey*, 101 Ill. 575; *Kiel v. Chicago*, 69 Ill. App. 685; *People v. Hicks*, 98 Mich. 86, 56 N. W. 1102; *People v. Abraham*, 16 App. Div. 58, 44 N. Y. S. 1077; *Pitts v. State*, 29 Tex. Ct. App. 374, 16 S. W. 189; *State v. Harding*, 20 Wash. 556, 56 Pac. 399, 929.

⁸ *State v. Jennings*, 98 Mo. 493, 11 S. W. 980.

⁹ *Commonwealth v. Loring*, 8 Pick. 573.

ute it must be averred and proved that the board of health or selectmen of no town in the commonwealth had given license to do the act complained of. The consequence would be, as oral testimony alone can be admitted on criminal trials of facts provable by witnesses, that the officers of every town to the number of three or four hundred must be summoned to give their personal attendance in the court where such prosecution is pending. We hazard nothing in saying that the legislature never intended such an absurdity." It was held that "any town" had reference to the town within which the offense was committed. In the confiscation act of congress of 1861 property used in aiding or promoting the rebellion was declared lawful subject of prize and capture wherever found.¹⁰ In *United States v. Athens Armory*¹¹ the court say: "Limit the term 'prize' or 'capture' as here employed to a strict technical import and the statute fails of its object and becomes an absurdity." Therefore, having in view that the purpose of the act was to make it "one of the means to suppress the rebellion," these words were held not to limit the operation of the act to property taken at sea.¹² A camp-meeting or a temporary encampment by a denomination of Christians for the purpose of religious exercises is "a place set apart for the worship of Almighty God" within the intent of an act prohibiting the retailing of spirituous liquors within a certain distance of such a place.¹³ "Trade" has been held to include "cod-fishery."¹⁴ To persuade a slave to leave was held "to aid him to depart."¹⁵ A vessel was held "at sea" when she was without the limits of any port or harbor on the sea coast.¹⁶ But under a statute which provides a penalty "if any person shall wilfully or maliciously kill, maim,

¹⁰ 12 U. S. Stats. at L., p. 319.

¹¹ 2 Abb. (U. S.) 129, 135, Fed. Cas. No. 14,473.

¹² *United States v. Athens Armory*, 35 Ga. 344.

¹³ *State v. Hall*, 2 Bailey, 151.

¹⁴ *The Schooner Nymph*, 1 Sumn. 516, Fed. Cas. No. 10,388.

¹⁵ *Crosby v. Hawthorn*, 25 Ala. 221.

¹⁶ *The Schooner Harriet*, 1 Story, 251, Fed. Cas. No. 6099.

beat or wound any horses, cattle, goats, sheep or swine, or shall wilfully injure or destroy any other property of another," a dog was held not included in the denomination of "other property."¹⁷ It was inferred from the use of the words "injure or destroy" with reference to the property designated by the phrase "any other property," that this latter expression was intended to include only inanimate property to which the terms "kill," "maim," "wound," etc., could not properly be applied. It was also said: "Nor do they [dogs] come within either class or description of the animals which are mentioned. They are not regarded by law as being of the same intrinsic value as property as the animals enumerated, and cannot, we think, be brought within the prohibition under the general expression 'any other property' by intendment."

§ 529 (357). Under a statute prohibiting any man marrying "his brother's wife," marrying his brother's *widow* is an offense.¹⁸ An act changing the venue of prosecutions for offenses committed on board any vessel "navigating" any river within the state was held applicable to a vessel so engaged, though at anchor at the time the offense was committed.¹⁹ "Where words are general," said Story, J., "and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, when the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in the statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another simply because it is more restrained, if the objects of the statute equal the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which

¹⁷ *State v. Marshall*, 13 Tex. 55.

¹⁸ *Commonwealth v. Perryman*, 2 Leigh, 717.

¹⁹ *People v. Hulse*, 3 Hill, 309.

harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature.”²⁰ A statute made robbery a capital offense, when the robber is, “at the time of committing such assault, armed with a dangerous weapon, with intent to kill or maim the person so assaulted and robbed.” To the contention that, to constitute the crime of robbery a capital offense within this statute, it must be proved that there was an absolute intent to kill or maim the party robbed, whether the robbery could be accomplished without killing or maiming or not, the court said: “If a statute, creating or increasing a penalty, be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this, any more than in any other case, to imagine ambiguities, merely that a lenient construction may be adopted. If such were the privilege of the court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms as to preclude the exercise of ingenuity in raising doubts about its construction.” It was held to be sufficient that the party be armed with a dangerous weapon with intent to kill or maim the party assaulted by him, in case such killing or maiming be necessary to his purpose of robbing, and that he have the power of executing such intent.²¹ Where for a specified offense the statute provides that the person convicted shall be fined not less than \$100, the construction is not to be so strict as to hold that a fine is not authorized above that sum. The court in such a case held that the exclusion of one subject or thing is the inclusion of all other things. “When the legislature,” say the court, “in this case, excluded the power of the court to impose a fine of less than \$100, it, by implication, authorized the exercise of power to impose a fine for more than that sum. It fixed the minimum, but fixed no maximum.”²²

²⁰ *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740.

²¹ *Commonwealth v. Martin*, 17 Mass. 359.

²² *Hankins v. People*, 106 Ill. 638.

§ 530. In *State v. Small*,²³ the court, referring to the rule of strict construction of penal statutes, says: "By this rule nothing more is meant than that penal statutes shall not, by what may be thought their spirit and equity, be extended to offenses other than those which are specifically and clearly described and provided for. The reason of the rule is that the law will not allow of constructive offenses or arbitrary punishments. . . . This rule of strict construction does not exclude the application of common sense to the terms made use of in the act. Even a penal statute should not be so construed as to work a public mischief, unless required by words of explicit and unequivocal import. Effect must be given to the intent of the legislature if clearly apparent upon the face of the statute, although such construction seem contrary to the exact letter of the statute." The words "diseased or distempered cattle affected with what is known as Texas or Spanish fever," in a penal statute, were held to include cattle infected with microbes or parasites by which the fever is communicated, though the cattle themselves were not diseased and were immune from the fever.²⁴ A statute made it a criminal offense "if any guardian of any female child under the age of eighteen years, or any other person to whose care or protection any such female shall have been confided, shall defile her," etc. It was held to include stepfathers. The court held that penal statutes were not to be construed so strictly as to defeat their obvious intent, and that it made no difference whether such females were confided to the care and protection of another by express contract or by operation of law, or by the defendant assuming the relation of stepfather.²⁵

§ 531 (358). What statutes are penal.—Among penal laws which must be strictly construed, those most obviously included are all such acts as in terms impose a fine or cor-

²³ 29 Minn. 216, 12 N. W. 703; Bol- S. W. 756, 47 Am. St. Rep. 653, 26 les v. Outing Co., 175 U. S. 262, 20 L. R. A. 638.

S. C. Rep. 94, 44 L. Ed. 156.

²⁵ *State v. Sibley*, 131 Mo. 519, 33

²⁴ *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 167.

poral punishment under sentence in state prosecutions, or forfeitures to the state as a punitory consequence of violating laws made for preservation of the peace and good order of society.²⁶ But these are not the only penal laws which have to be so construed. There are to be included under that denomination also all acts which impose by way of punishment any pecuniary mulct or damages beyond compensation for the benefit of the injured party, or recoverable by an informer, or which, for like purpose, impose any special burden, or take away or impair any privilege or right.²⁷

An act which made a tender of bills emitted by the continental congress a bar to any future demand of a debt was held highly penal, and not to be extended beyond the strict import of its language.²⁸ A law prohibited the circulation or passing of "tickets" under penalty. The court held that it did not apply to a man giving a due-bill or other written evidence of a debt. "A penal statute," say the court, "taking away or abridging the right of individuals to give or receive a written acknowledgment of a debt due, or a promise to pay a debt, in money or goods, ought to be very plain and explicit in its terms; and a party seeking to recover the penalty ought to show a case clearly and distinctly within the provisions of the statute."²⁹ A statute which sub-

²⁶ *Levy v. Superior Court*, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811; *Commonwealth v. Equitable Life Ins. Soc.*, 100 Ky. 341, 38 S. W. 491; *Scott v. Missouri Pac. Ry. Co.*, 38 Mo. App. 523; *Ex parte Howe*, 26 Ore. 181, 37 Pac. 536; *Klechner v. Turk*, 45 Neb. 176, 63 N. W. 469.

²⁷ *Allen v. Stevens*, 29 N. J. L. 509; *Cole v. Groves*, 134 Mass. 471; *Camden, etc. R. R. Co. v. Briggs*, 22 N. J. L. 623; *Read v. Stewart*, 129 Mass. 407; *Breitung v. Lindauer*, 37 Mich. 217; *Cumberland, etc. Canal v. Hitchings*, 57 Me. 146; *Reed v. Northfield*, 13 Pick. 96;

Palmer v. York Bank, 18 Me. 166, 86 Am. Dec. 710; *Bayard v. Smith*, 17 Wend. 88; *Bay City, etc. R. R. Co. v. Austin*, 21 Mich. 390; *Henderson v. Sherborne*, 2 M. & W. 236; *Merchants' Bank v. Bliss*, 13 Abb. Pr. 225; *Titusville's Appeal*, 108 Pa. St. 600; *Marston v. Tryon*, id. 270; *Omaha & R. V. Ry. Co. v. Hale*, 45 Neb. 418, 63 N. W. 849, 50 Am. St. Rep. 554.

²⁸ *Shotwell's Ex'r v. Dennman*, 1 N. J. L. 174; *Suffolk Bank v. Worcester Bank*, 5 Pick. 106.

²⁹ *Allaire v. Howell Works Co.*, 14 N. J. L. 21, 23.

jects a mortgagee to a penalty for refusal to discharge a mortgage will be construed strictly; the requirement is dependent upon a full performance of the conditions of the instrument.³⁰ It will not be applied to the assignee of a mortgage.³¹ A similar rule of strict construction has been applied to an act imposing a penalty for delinquency in discharging a satisfied judgment.³² An act gave treble damages for waste committed on land pending a suit for its recovery. It was held highly penal, and therefore to be limited in its application to the object the legislature had in view; it was necessary to aver a case within its terms.³³ An act giving the party injured an action to recover a penalty imposed on a public officer for taking excessive fees was held a penal one, and, being construed strictly, was inapplicable to one who took the illegal fees after the expiration of his term for services performed while in office.³⁴

The following acts were held to be penal and subject to the rule of strict construction: An act giving one hundred per cent. per annum penalty for a failure to pay over fees collected;³⁵ an act that where imported goods are undervalued, an additional sum shall be collected largely in excess of the rate of duty;³⁶ a statute providing for the recovery of one cent a bushel for wheat withheld from the holder of the receipt after demand made;³⁷ a statute allowing owners adjoining a railway to build a fence along the right of way and recover double its value from the railway;³⁸ a statute requiring railroads to keep certain records of animals killed and making them liable for double their value.

³⁰ *Stone v. Lannon*, 6 Wis. 497.

³¹ *Grooms v. Hannon*, 59 Ala. 510.

³² *Marston v. Tryon*, 108 Pa. St. 270.

³³ See *Reed v. Davis*, 8 Pick. 514. See *Bay City, etc. R. R. Co. v. Austin*, 21 Mich. 390; *McDonald v. Montana Wood Co.*, 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.

³⁴ *Aechternacht v. Watmough*, 8 Watts & S. 162.

³⁵ *State v. Peterson*, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094.

³⁶ *Helwig v. United States*, 188 U. S. 605, 23 S. C. Rep. 427.

³⁷ *Ferch v. Victoria Elevator Co.*, 79 Minn. 416, 82 N. W. 678.

³⁸ *McNear v. Wabash Ry. Co.*, 42 Mo. App. 14.

for failure to do so;³⁹ a statute authorizing the recovery of three times the damages sustained by a violation of the act.⁴⁰ A statute which provided for the disbarring of attorneys was held to be penal,⁴¹ also a valued policy act.⁴² Statutes making the officers and directors of corporations liable for the debts of the corporation, for a failure to make certain reports, or for making a false report or certificate, are usually regarded as penal and to be strictly construed.⁴³ Whether statutes imposing upon stockholders a liability for the debts of the corporation are penal or not, depends upon the nature and conditions of the liability.⁴⁴ Statutes having some characteristics of penal statutes, but held to be remedial, are considered in the next chapter.⁴⁵

§ 532 (359). Statutes which provide a penalty recoverable by the party aggrieved are remedial as well as penal. Hence two diverse principles have some application: that of requiring strict construction on account of the penalty, and that of liberal construction to prevent the mischief and advance the remedy. Where a penalty, like double dam-

³⁹ Atchison, T. & S. F. R. R. Co. 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930.
 v. Tanner, 19 Colo. 559, 36 Pac. Rep. 930.
 541.

⁴⁰ Baker Wire Co. v. C. & N. W. Ry. Co., 106 Iowa, 239, 76 N. W. 665.

⁴¹ Moutray v. People, 162 Ill. 194, 44 N. E. 496.

⁴² Thurber v. Royal Ins. Co., 1 Marvel (Del.), 251, 40 Atl. 1111.

⁴³ 3 Thompson on Corps., § 4164 et seq.; Colorado Fuel & Iron Co. v. Lenhart, 6 Colo. App. 511, 41 Pac. 834; Edwards v. Cleveland Dryer Co., 83 Ill. App. 643; Gans v. Switzer, 9 Mont. 408, 24 Pac. 18; Welthey v. Kemper, 17 Mont. 491, 43 Pac. 716; Manhattan Co. v. Kalderberg, 165 N. Y. 1, 58 N. E. 790; Torbett v. Goodwin, 62 Hun, 407, 17 N. Y. S. 46. See Farr v. Briggs,

⁴⁴ See 3 Thompson on Corps., § 3013 et seq.; Love v. Pusey, 3 Penn. (Del.) 577, 53 Atl. 542; Guernsey v. Moore, 131 Mo. 650, 32 S. W. 1132; Kimball v. Davis, 52 Mo. App. 494; Kenealy v. Leavy, 67 N. J. L. 435, 51 Atl. 475; Kulp v. Fleming, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611; Hancock National Bank v. Farnum, 20 R. I. 466, 40 Atl. 341.

⁴⁵ See also *ante*, § 337; Brady v. Daly, 175 U. S. 148, 20 S. C. Rep. 62, 44 L. Ed. 109; Gardner v. New York & N. E. R. R. Co., 17 R. I. 790, 24 Atl. 831; Taylor v. W. U. Tel. Co., 95 Iowa, 740, 64 N. W. 660; Dale v. Atchison, etc. R. R. Co., 57 Kan. 601, 47 Pac. 521.

ages or any other form of pecuniary mulct recoverable by the party injured, is the only remedial instrumentality, the act as to that party is remedial only in the same sense that all punitive laws are so — for the benefit of the public at large. The courts look with no favor upon the penalty, but incline against it.⁴⁶ They will only permit it to be recovered upon a case which falls both within the letter and spirit of the act.⁴⁷ They will not permit a recovery of it in a case not within the letter, merely because it is not excluded by it and is within the mischief intended to be corrected. In *Sickles v. Sharp*⁴⁸ the court say: "The rule that penal statutes are to be strictly construed, when they act on the offender, and inflict a penalty, admits of some qualification. In the construction of statutes of this description it has been often held that the plain and manifest intention of the legislature ought to be regarded. *A statute which is penal to some persons, provided it is beneficial generally, may be equitably construed.*" The italicised sentence is too general; if applied in its full scope it would leave nothing for strict construction. The penalty was recovered in that case for an act held to be within the strict letter.

§ 533 (360). In *Farmers' & Mechanics' National Bank v. Dearing*,⁴⁹ it was said by the court that the thirtieth section of the national bank act "is remedial as well as penal, and is to be liberally construed to effect the object congress had in view in enacting it." Usury had been taken by a bank doing business in New York, and a forfeiture of the whole debt had been adjudged in accordance with the local law. This was held erroneous; section 30 prescribes the exclusive and uniform penalty — that is, the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon, when the rate knowingly received, reserved and charged by a national bank is

⁴⁶ *Renfroe v. Colquitt*, 74 Ga. 618;
Farmers' & Mechanics' Nat. Bank
v. Dearing, 91 U. S. 29, 23 L. Ed.
 196.

⁴⁷ *Ante*, § 519.

⁴⁸ 13 John. 497.

⁴⁹ 91 U. S. 29, 35, 23 L. Ed. 196.

in excess of that allowed by that section. The court emphasized the rule of strict construction, and the whole judicial argument is toward a milder view of the law than that taken by the state court, whose decision was reversed.

The true sense in which the section in question was remedial and to be liberally construed was probably declared in *Ordway v. Central National Bank of Baltimore*.⁵⁰ An action was brought in the state court for the forfeiture declared by that section. The question was whether it was recoverable in that court. Recovery there was sustained. The court by Alvey, J., say: "The cause of action is a forfeiture or penalty of a civil nature, for the exacting and taking of usurious interest upon money loaned, and the remedy given by the statute is by a private civil action of debt to the party grieved. The government or the public is not concerned with it. It is, therefore, a private right pursued by a private civil action. And it has been decided that the section upon which the action is founded is *remedial* as well as penal, and is to be liberally construed to effect the object which congress had in view in enacting it."⁵¹ The liberality of construction relates to the remedy and not to the provision giving the penalty.⁵² Park, J., in *Gorton v. Champneys*,⁵³ speaking of a statute, said: "It is a law to prevent and suppress frauds; and it is a clear and fundamental rule in construing statutes against frauds, that they are to be liberally and beneficially expounded; and in our best text-book this position is to be found: that where the statute acts against the offender and inflicts a penalty, it is then to be construed strictly; but where it acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally."⁵⁴ There is, therefore, a class

⁵⁰ 47 Md. 217, 28 Am. Rep. 455.

⁵¹ 1 Bing. 287, 300.

⁵² Citing *Farmers', etc. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196.

⁵⁴ See *Hahn v. Salmon*, 20 Fed. Rep. 801; *Cumming v. Fryer*, Dudley, 182; *Smith v. Moffat*, 1 Barb. 65; *Sharp v. Mayor, etc.*, 31 id. 577;

⁵³ See *Abbott v. Wood*, 22 Me. 541.

of statutes which is in part remedial and to be liberally construed, to advance the remedy, and in part penal, and to that extent, as it operates against the offender, to be construed like other penal laws, strictly.⁵⁵ The liberal construction allowed to advance the remedy is well illustrated by the case of *Frohock v. Pattee*.⁵⁶ A statute provided that "any person who shall knowingly aid or assist any debtor or prisoner in any fraudulent concealment or transfer of his property to secure the same from creditors, etc., shall be answerable in a special action on the case to any creditor who may sue for the same in double the amount of the property so fraudulently transferred; not, however, exceeding double the amount of such creditors' just debt or demand." It appeared that a creditor had brought a suit and recovered on this provision. The question was whether, in the absence of an issue in regard to the amount of that recovery, it was a bar to the present suit, as would be its effect if it were treated as a penal statute proper. It was held not to be such a statute, and therefore the former judgment in favor of one creditor only barred another to the extent of the recovery towards twice the value of the property fraudulently conveyed. Such actions are not criminal actions and are not governed by the same rules. A decision for a defendant is not an acquittal which is final within the protection of the constitutional provision against being put twice in jeopardy. A defeated plaintiff may move for a new trial as in other civil cases.⁵⁷ Where a statute gives penal damages to the injured party they are part of his indemnity.⁵⁸ And where the common-law action for the injury

White v. Steam Tug, 6 Cal. 462; (D. C.) 453; *State v. Whitaker*, 160 Ellis v. Whitlock, 10 Mo. 781; *Hyde* Mo. 59, 60 S. W. 1068; *Smith v. Cogan*, 2 Doug. 699, 706; *Abbott* Townsend, 148 U. S. 490, 13 S. C. v. Wood, 22 Me. 541. Rep. 634, 37 L. Ed. 533.

⁵⁵ *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779; *Prather v. United States*, 9 App. Cas. (D. C.) 82; *Lauer v. District of Columbia*, 11 App. Cas.

⁵⁶ 38 Me. 103.

⁵⁷ *Stanley v. Wharton*, 9 Price, 301.

⁵⁸ *Reed v. Northfield*, 13 Pick. 94.

survives and is therefore assignable, the penal damages given by statute are also assignable.⁵⁹

§ 534. **Miscellaneous cases on the construction of penal laws.**—The penal provisions of a revenue law are to receive a reasonable construction in aid of the purposes of the act, rather than a strict and narrow one in the interest of those who violate or evade its provisions.⁶⁰ A penal statute required owners of sheep to procure an annual license, but provided that it should not apply to persons who owned or held one acre of land for each two sheep. It was held that the proviso should have a liberal construction against the penalty, and a person having a right of possession to the requisite amount of land was held within the proviso.⁶¹ A statute made it a misdemeanor for a person to carry concealed weapons *except when on his own premises*. The italics were held to mean the person's own private premises, and the manager of a turnpike company on the property of the company was held not within the exception.⁶² A statute making it an offense to take indecent and improper liberties with the person of a female child under fourteen years of age was held to mean such liberties as the common sense of society would regard as indecent and improper.⁶³ Where a statute prescribes a punishment of "imprisonment for life or for any term of years," the minimum is two years.⁶⁴ A statute punished "an assault with an intent to commit murder, rape, mayhem, robbery, larceny, or *other felony*." It was held that the use of the words "other felony" did not limit the word "larceny" to grand larceny, grand larceny only being a felony.⁶⁵ A statute aimed at certain crimes that nec-

⁵⁹ Gray v. Bennett, 3 Metc. 522; ⁶² State v. Perry, 120 N. C. 580, 26 Brandon v. Pate, 2 H. Black. 308; S. E. 915, 1008.

Brandon v. Sands, 2 Ves. Jr. 514. ⁶³ People v. Hicks, 98 Mich. 86, 56 N. W. 1102.

⁶⁰ Lauer v. District of Columbia, 11 App. Cas. (D. C.) 453; Prather v. ⁶⁴ People v. Burrige, 99 Mich. United States, 9 App. Cas. (D. C.) 343, 58 N. W. 319; Ex parte Seymour, 14 Pick. 43.

⁶¹ State v. Wheeler, 23 Nev. 143, ⁶⁵ Kelly v. People, 132 Ill. 363, 24 44 Pac. 430. N. E. 56.

essarily require force was amended so as to make it apply to any one who should advise an attempt to commit any arson or other felony. It was held that it only applied to an attempt to commit a felony necessarily involving force and so did not apply to an attempt to commit adultery.⁶⁶ If an act is clearly within a criminal statute, the court cannot inquire whether it is injurious to the public interests.⁶⁷

§ 535 (361). *Revenue laws.*—There are many cases in the federal courts in which it has been declared that the revenue laws are not to be regarded as penal in the sense that requires them to be strictly construed in favor of the defendant, though they impose penalties and forfeitures. They have even been declared remedial in character, as intended to prevent fraud, suppress public wrong and to promote the public good.⁶⁸ These declarations tend to establish an exceptional and arbitrary rule in this class of cases, at war with elementary principles universally recognized in other cases. Other penal laws are made to punish and prevent frauds, as, for example, statutes providing a punishment for obtaining money or goods under false pretenses. All penal laws are intended to promote the public good. Strict construction is based on humane considerations which are applicable with more or less force in all cases where a statute

⁶⁶ *State v. Goodrich*, 84 Wis. 359, 54 N. W. 577.

⁶⁷ *United States v. Northern Securities Co.*, 120 Fed. 721.

⁶⁸ *Wood v. United States*, 16 Pet. 342, 10 L. Ed. 987; *Taylor v. United States*, 3 How. 197, 11 L. Ed. 559; *Cliquot's Champagne*, 3 Wall. 114, 18 L. Ed. 116; *In re Twenty-eight Cases*, 2 Ben. 63, Fed. Cas. No. 14,281; *United States v. Willets*, 5 Ben. 220, Fed. Cas. No. 16,699; *United States v. Three Tons of Coal*, 6 Biss. 379, Fed. Cas. No. 16,515; *United States v. Cases of Cloth, Crabbe*, 356, Fed. Cas. No. 16,563; *United*

States v. Barrels of Highwines, 7 Blatch. 459, Fed. Cas. No. 16,418; *United States v. Olney*, 1 Abb. (U. S.) 275, Fed. Cas. No. 15,918; *United States v. Barrels of Spirits*, 2 Abb. (U. S.) 305, Fed. Cas. No. 15,948; *United States v. Hodson*, 10 Wall. 395, 19 L. Ed. 937; *United States v. Breed*, 1 Sumn. 159, Fed. Cas. No. 14,638; *United States v. One Hundred and Twenty-nine Packages*, 2 Am. L. Reg. (U. S.) 419; *Prather v. United States*, 9 App. Cas. (D. C.) 82; *Laure v. District of Columbia*, 11 App. Cas. (D. C.) 453.

provides for punishment. These considerations are as pertinent to acts which are supposed to be infractions of a revenue law as to other criminal acts; as pertinent when the government is the sufferer as when a private citizen is injured; as well when the offense is odious fraud as when it is atrocious violence. These declarations, so frequently made in revenue cases, have not been practically followed by any notable departures from the strict rule. And they have generally been qualified by the enunciation of the sound principle applicable to all penal provisions, that they are to be construed according to the true intent and meaning of their terms, and when the legislative intention is thus ascertained, that and that only is to be the guide in interpreting them.⁶⁹ No case has arisen in which a penalty or forfeiture has been sustained for being within the supposed intention of the statute when not within its terms. In *Mills v. Thurston County*⁷⁰ the court says: "While there is some conflict in the authorities as to whether revenue statutes should be given a liberal or strict construction, it seems to us that the better rule is that they should receive a fair construction to effect the end for which they were intended."

It was declared in *United States v. Wigglesworth*,⁷¹ that statutes levying taxes or duties on subjects or citizens are to be construed most strongly against the government, and in favor of the subjects or citizens, and their provisions are not to be extended by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy.⁷² And the supreme court of

⁶⁹ *Taylor v. United States*, 3 How. 197, 11 L. Ed. 559; *United States v. Breed*, 1 Sumn. 159, Fed. Cas. No. 14,638; *United States v. Distilled Spirits*, 10 Blatchf. 428, 433, Fed. Cas. No. 15,960.

⁷⁰ 16 Wash. 378, 380, 47 Pac. 759.

⁷¹ 2 Story, 369, Fed. Cas. No. 16,670.

⁷² The characterizing of such

laws as remedial has not escaped criticism. Mr. Cooley, in his work on Taxation, says: "It seems highly probable that the word *remedial* has been employed by the learned judge in this case [*United States v. Hodson*, *supra*] in a sense differing from that in which it is commonly used in the law. A reme-

the United States holds that doubts as to the construction of such acts should be resolved in favor of the importer.⁷³ Blackstone laid down the rule that penal statutes must be construed strictly. Then he proceeds to say: "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being penal. But this difference is to be taken: Where the statute acts upon the offender and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally."⁷⁴ Revenue laws are intended to raise money for the support of the government. If they contain provisions for penalties and forfeitures these are ancillary to that object; but they are not for that reason to be necessarily construed in point of strictness by the same rule. As penal laws, no reason is perceived why the same rule of

dial law, as the term is generally employed, is something quite different from the revenue laws. An author of accepted authority expresses the ordinary understanding when he defines a remedial statute to be 'one which supplies such defects and abridges such superfluities of the common law as may have been discovered (1 Black. Com. 86); such as may arise either from the imperfection of all human laws, from change of time and circumstances, from mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatever; and this being done either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, has occasioned another subordinate division of remedial acts into *enlarging* and *re-*

straining statutes. So it seems that a remedial statute may also have its application to and effect upon other existing statutes, and give a party injured a remedy; and for a more general definition, it is a statute giving a party a mode of remedy for a wrong where he had none or a different one before.' "Potter's Dwarrior on St. 73. He concludes that in applying the word "remedial" to tax laws it was used in some political or special, rather than in the strict legal, sense, and that it was not the intention of the court to overrule the opinion of Mr. Justice Story in *Wiggleworth's case*. Cooley on Tax., 204, 205.

⁷³ *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 12 S. C. Rep. 55, 35 L. Ed. 821; *Benzinger v. United States*, 192 U. S. 38.

⁷⁴ 1 Bl. Com. 38.

strict construction should not be applied to them as to other such laws. Mr. Dwarris remarks that, "By the use of ambiguous clauses in laws of that sort the legislature would be laying a snare for the subject, and a construction which conveys such an imputation ought never to be adopted. Judges, therefore, where clauses are obscure, will lean against forfeitures, leaving it to the legislature to correct the evil, if there be any. With this view, the ship registry acts, so far as they apply to defeat titles and to create forfeitures, are to be construed strictly, as penal, and not liberally, as remedial, laws. In like manner, in the revenue laws, where clauses inflicting pains and penalties are ambiguously or obscurely worded, the interpretation is ever in favor of the subject; 'for the plain reason,' said Heath, J., in *Hubbard v. Johnstone*, 'that the legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed.'"⁷⁵

§ 536 (362). **Statutes which impose burdens — Taxes.**— Acts for taxation of persons or property are prominent in this category. The power to tax is sovereign, and its exercise needful to supply the government with money necessary for its support. When limited to the accomplishment of this object it is beneficent, but since it is so unlimited in force and so searching in extent that courts recognize no restrictions except such as rest in the discretion of the au-

⁷⁵ 3 Taunt. 177; Dwarris on St. 641. Mr. Cooley thus comments on this point: "In the state revenue laws the penal provisions are few, and by no means severe. In the federal revenue laws some of them are of a severity very seldom to be met with in penal statutes, and only to be justified by the supposed impossibility of collecting the revenue without them. In illustration of what is here said, reference need only to be made to the case of forfeiture of property for the

mere indulgence of a fraudulent intent never carried into effect; a forfeiture, too, which may be visited upon a purchaser who has bought in good faith, and without any suspicion of the intended fraud. *Henderson's Distilled Spirits*, 14 Wall. 44, 20 L. Ed. 815. If such provisions are to be construed liberally, there is no reason why any other penal provisions whatever should not be." Cooley on Taxation, 208.

thority which exercises it; since it reaches to every trade and occupation, to every object of industry, use or enjoyment, to every species of possession, and imposes a burden which in case of failure to discharge it may be followed by summary seizure and sale or confiscation of property; since no attribute of sovereignty is more pervading or affects more constantly and intimately all the relations of life,⁷⁶ and involves the power to destroy, and may neutralize the power to foster and create,⁷⁷ statutes enacted in the exercise of the taxing power are construed with some degree of strictness. It is a special authority, and in its exercise the citizen is deprived of his property. However meritorious the purpose for which such a power is granted, the courts will be sedulous in confining it within the boundaries the legislature have thought fit to prescribe.⁷⁸ The supreme court of New Jersey say: "In laying the burden of taxation upon the citizens of the state, while it must be the object of every just system to equalize this charge by a fair apportionment and levy upon the property of all, it is equally the duty of the courts to see that no one, by mere technicalities which do not affect his substantial rights, shall escape his fair proportion of the public expense and thus impose it upon others. A liberal construction must therefore be given to all tax laws for public purposes, not only that the officers of the government may not be hindered, but also that the rights of all taxpayers may be equally preserved."⁷⁹ "If it be a matter of real doubt," said Mr. Jus-

⁷⁶ Cooley on Const. Lim. 479; Litchfield v. Vernon, 41 N. Y. 123, 140, 143; Henry v. Chester, 15 Vt. 460.

⁷⁷ McCulloch v. Maryland, 4 Wheat. 431, 4 L. Ed. 579.

⁷⁸ Powell v. Tuttle, 3 N. Y. 396, 401; Sherwood v. Reade, 7 Hill, 431; Striker v. Kelly, 2 Denio. 323.

⁷⁹ State v. Taylor, 35 N. J. L. 184, 190. The language of a distin-

guished author is apposite, and expresses the law with felicity and accuracy: "In the construction of the revenue laws special consideration is of course to be had of the purpose for which they are enacted. That purpose is to supply the government with a revenue. But in the proceedings to obtain this it is also intended that no unnecessary injury shall be inflicted

tice Story, "whether the intention of the act of 1841 was to levy a permanent duty on indigo, that doubt will absolve the importer from paying the duty."⁸⁰

In *Gurr v. Scudds*,⁸¹ Pollock, C. B., says: "If there is any doubt as to the meaning of the stamp act, it ought not to be construed in favor of the subject, because a tax cannot be imposed without clear and express words for that purpose." This seems to be the tenor of all the English decisions, that every charge on the subject must be imposed by clear and unambiguous words.⁸² In a late case before the

upon the individual taxed. While this is secondary to the main object—the impelling occasion of the law—it is none the less a sacred duty. Care is taken in constitutions to insert provisions to secure the citizen against injustice in taxation, and all legislative action is entitled to the presumption that this has been intended. We are therefore at liberty to suppose that the two main objects had in view in framing the provisions of any tax law were, first, the providing a public revenue, and second, the securing of individuals against extortion and plunder under the cover of the proceedings to collect the revenues. The provisions for these purposes are the important provisions of the law. . . . The question regarding the revenue laws has generally been whether or not they shall be construed strictly. The general rules of interpretation require this in the case of statutes which may divest one of his freehold by proceedings not in the ordinary sense judicial, and to which he is only an enforced party. It is thought to be only reasonable to intend that the legislature, in mak-

ing provision for such proceedings, would take unusual care to make use of terms which would plainly express its meaning, in order that ministerial officers might not be left in doubt in the exercise of unusual powers, and that the citizen might know exactly what were his duties and liabilities. A strict construction in such cases is reasonable, because presumptively the legislature has given in plain terms all the power it has intended should be exercised. It has been very generally supposed that the like strict construction was reasonable in the case of tax laws." *Cooley on Taxation*, 199, 200; *Dwarris on Statutes*, 742, 749.

⁸⁰ *United States v. Wigglesworth*, 2 Story, 369, 374, Fed. Cas. No. 16,690.

⁸¹ 11 Ex. 190, 192.

⁸² *Wroughton v. Turtle*, 11 M. & W. 561, 567; *Williams v. Sangar*, 10 East, 66, 69; *Warrington v. Furber*, 8 id. 242, 245; *Denn v. Diamond*, 4 B. & C. 243; *Doe v. Snaith*, 8 Bing. 146, 152; *Tomkins v. Ashby*, 6 B. & C. 541, 543; *Marquis of Chandos v. Commissioners*, 6 Ex. 464, 479; *Oriental Bank v. Wright*, L. R. 5 App. Cas. 842; *Pryce v. Monmouthshire*

house of lords,⁸³ it was said: "The principle of all fiscal legislation is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case may otherwise appear to be. In other words, if there is admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

§ 537 (363). **The American cases generally announce the same rule of construction.**—Laws imposing taxes are strictly construed,⁸⁴ and doubts are resolved in favor of the taxpayer.⁸⁵ But some courts hold that such laws, being for public purposes, should be liberally construed in favor of the public.⁸⁶ "Duties," says Mr. Justice Nelson, "are never imposed upon a citizen upon vague or doubtful interpretations."⁸⁷ Statutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon

Canal & Ry. Co., L. R. 4 App. Cas. 197; Reg. v. Barclay, L. R. 8 Q. B. Div. 306; Daines v. Heath, 3 C. B. at p. 941; Gosling v. Veley, 12 Q. B. at p. 407; Caswell v. Cook, 11 C. B. (N. S.) 637; Burder v. Veley, 12 Ad. & E. at p. 246; Att'y-Gen. v. Middleton, 3 H. & N. at p. 138; Iles v. West Ham Union, L. R. 8 Q. B. Div. 69; In re Micklethwait, 11 Ex. 452.

Cutcheon v. Pac. R. R. Co., 72 Mo. App. 271.
⁸⁵ McNally v. Field, 119 Fed. 445.
⁸⁶ Bacon v. Board of State Tax Commissioners, 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524; Salisbury v. Lane, 7 Idaho, 370, 63 Pac. 383.
⁸⁷ Powers v. Barney, 5 Blatchf. 202, 203, Fed. Cas. No. 11,361; United States v. Wigglesworth, 2 Story, 369, 373, Fed. Cas. No. 16,690; United States v. Watts, 1 Bond, 580, 583, Fed. Cas. No. 16,653; Vicksburg, etc. R. R. Co. v. State, 62 Miss. 105; Mayor v. Hartridge, 8 Ga. 23; Crosby v. Brown, 60 Barb. 548; Dean v. Charlton, 27 Wis. 522; Shawnee Co. v. Carter, 2 Kan. 115; Bensley v.

⁸³ Partington v. Att'y-Gen., L. R. 4 H. L. Cas. 122.

⁸⁴ Merced County v. Helm, 102 Cal. 159, 36 Pac. 399; Chicago, R. I. & P. Ry. Co. v. Ottumwa, 112 Iowa, 300, 83 N. W. 1074, 51 L. R. A. 63; Cincinnati v. Conover, 55 Ohio St. 82, 44 N. E. 582; Memphis v. Bing, 94 Tenn. 644, 30 S. W. 745; Mc-

them, must be strictly construed.⁸⁸ A statute conferring authority to impose taxes must be construed strictly.⁸⁹ A tax law cannot be extended by construction to things not named or described as the subjects of taxation.⁹⁰ A statute required taxes for school purposes to be levied on all the ratable estate of persons who are residents of the district; it authorized an executor to put the property of the estate in the list in the name of the estate. It was held that the ratable estate of the deceased pending administration might be assessed in the district where the deceased lived and died. The court say: "The greatest and perhaps the only objection that can be urged against this rule is, that we cannot say in strictness that the deceased or his estate is a resident of the district. This objection assumes that the statute is to be strictly construed. But we do not think that the doctrine of strict construction should apply to it. Statutes relating to taxes are not penal statutes, nor are they in derogation of natural rights."⁹¹ That case seems to have been properly determined, and did not require a denial that tax laws are to be strictly construed. The law expressly allowed the listing of the decedent's estate in the name of the deceased person's estate, and therefore the levy of a tax on such a resident as such an "intangible being" could be. The court was in accord with the general current of authority in concluding that in construing statutes relating to taxes they "ought, where the language will permit, so to construe them as to give effect to the obvious intention and meaning of the legislature, rather than defeat that intention by too strict an adherence to the letter."⁹² A statute to re-assess a void tax will be construed strictly. Such a statute is in derogation of the rights of the citizen who may be

Mountain Lake Water Co., 13 Cal. 306, 316, 73 Am. Dec. 575.

⁸⁸ Sewall v. Jones, 9 Pick. 412, 414.

⁸⁹ Moseley v. Tift, 4 Fla. 402; Williams v. State, 6 Blackf. 36; Barnes v. Doe, 4 Ind. 132, 133; Smith v.

Waters, 25 Ind. 397; Fox's Appeal, 112 Pa. St. 337, 4 Atl. 149.

⁹⁰ Boyd v. Hood, 57 Pa. St. 98, 101.

⁹¹ Cornwall, Ex'r, v. Todd, 38 Conn. 443.

⁹² See 3 Parsons on Cont. 287.

affected by it; it compels him to bear a burden which he would not have to bear but for it. A due regard for individual rights and the plainest principles of justice require that taxing statutes shall have only the effect which the legislature clearly intended; in construing them all reasonable doubts as to such intent should be resolved in favor of the citizen.⁹³ Every statute in derogation of the rights of property or that takes away the estate of the citizen ought to be construed strictly. It should never have an equitable construction.⁹⁴ Statutes providing for redemption of lands sold for taxes should be construed liberally.⁹⁵

§ 538. A statute provided that if any property should be omitted from the assessment of any year or years and not put upon the assessor's books, the same should, when discovered, be assessed and placed on the book with all arrearages of taxes charged against it. The statute was held to apply to an omitted town tax, though the property was assessed and entered in the book, there being simply a failure to extend this particular tax against the property. The court held that the case was within the intent, though not within the letter of the law, and that tax laws should be so construed as to give effect to the obvious intent rather than to defeat that intent by a too strict adherence to the letter.⁹⁶ A statute imposing a tax on the owner or lessee of a building used for theatrical purposes was held not to apply to a building equipped and rented for social purposes and which was occasionally used for theatricals by amateurs.⁹⁷ A statute provided that from any offset claimed by a taxpayer there should be deducted the amount of United States bonds and other stocks and bonds "exempt from taxation by the laws of this state," which were held by him.

⁹³ *Dean v. Charlton*, 27 Wis. 522. 207; *Poling v. Parsons*, 38 W. Va.

⁹⁴ *Sharp v. Speir*, 4 Hill, 76, 83; 80, 18 S. E. 379.

Vanhorne's Lessee v. Dorrance, 2 ⁹⁶ *Aggers v. People*, 20 Colo. 348, Dall. 304; *Sibley v. Smith*, 2 Mich. 38 Pac. 386.

486, 490.

⁹⁷ *Oellers v. Horn*, 3 Pa. Supr. Ct.

⁹⁵ *Alter v. Shepherd*, 27 La. Ann. 537.

Stock exempt by virtue of a municipal vote authorized by law was held to be within the provision and to be deducted.⁹⁸ A statute declared that taxes should be a perpetual lien on real estate until paid. Other provisions barred any action to foreclose the lien after the lapse of five years. It was held that the lien did not continue after the right to enforce it was gone.⁹⁹ A statute limiting the time to object to a special tax bill was held not to apply to a void tax bill.¹ Proceedings for the collection of taxes are summary and *ex parte* and the statute in that respect must be strictly pursued.² Taxing an occupation is held not to legalize it.³

§ 539 (364). **Exemption from taxation or other general burden.**—Not only is all legislation for taxation, but also for exemption from taxation, or any other common burden or liability, to be strictly construed. The principle is well settled that the power of exemption, as well as the power of taxation, is an essential element of sovereignty, and can only be surrendered or diminished in plain and explicit terms.⁴

⁹⁸ *Richardson v. St. Albans*, 72 Vt. 1, 47 Atl. 100.

⁹⁹ *D'Getti v. Sheldon*, 27 Neb. 829, 44 N. W. 30.

¹ *Richter v. Merrill*, 84 Mo. App. 150.

² *Hughes v. Linn County*, 37 Ore. 111, 60 Pac. 848.

³ *Palmer v. State*, 88 Tenn. 553, 13 S. W. 233, 8 L. R. A. 280; *Brown v. State*, 88 Tenn. 566, 13 S. W. 236.

⁴ *Probasco Co. v. Moundsville*, 11 W. Va. 501; *McLean County v. Bloomington*, 106 Ill. 209, 5 Am. & Eng. Corp. Cas. 535; *Lima v. Cemetery Ass'n*, 42 Ohio St. 128; S. C., 5 Am. & Eng. Corp. Cas. 547; *Mayor, etc. v. Central R. R. etc. Co.*, 50 Ga. 620; *Gale v. Laurie*, 5 B. & C. 156; *Buffalo City Cemetery Co. v. Buffalo*, 46 N. Y. 506; *State v. Bank of*

Smyrna, 2 Houst. 99; *Willis v. Railroad Co.*, 32 Barb. 398; *Orr v. Baker*, 4 Ind. 86; *St. Louis, etc. Ry. Co. v. Berry*, 41 Ark. 509; *Rue v. Alter*, 5 Denio, 119; *St. Louis Ry. Co. v. Loftin*, 98 U. S. 559, 25 L. Ed. 222; *Cincinnati College v. State*, 19 Ohio, 110; *State v. Mills*, 34 N. J. L. 177; *Gordon's Ex'r v. Mayor, etc.*, 5 Gill, 231; *Weston v. Supervisors*, 44 Wis. 242; *State v. McFetridge*, 64 id. 130; 24 N. W. 140; *State v. Manchester Savings Bank*, 71 N. H. 535, 53 Atl. 739; *Waller v. Hughes*, 2 Ariz. 114, 11 Pac. 122; *Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045; *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75; *State v. Arnold*, 136 Mo. 446, 38 S. W. 79. Exemption from taxation does not include exemption from local assessments. 5

In *Knoxville & Ohio R. R. Co. v. Harris*,⁵ the court says: "Taxes are the life-blood of civil government. The right of taxation is an attribute of sovereignty. It is inherent in the state and essential to the perpetuity of its institutions; consequently, he who claims exemption must justify his claim by the clearest grant of organic or statute law. Every presumption is against any surrender of the taxing power, and every doubt must be resolved in favor of the state. Unless the intention to surrender that power is manifested by words too plain to be mistaken, it must be held still to exist."

Statutes and provisions exempting persons or property from taxation are strictly construed.⁶ An exemption of

Am. & Eng. Corp. Cas. 552, note. "An exception as to the exemption is made in favor of sales for non-payment of taxes or assessments, and for a debt or liability incurred for the purchase or improvement of the premises, thus, according to a familiar rule of construction, excluding, by necessary implication, any other exemption; and the language expressly excludes every other known mode of incumbering and conveying the property." *Eldridge v. Pierce*, 90 Ill. 474. Statutes exempting railroad property from taxation are to be liberally construed if a license fee or other equivalent is paid in lieu of taxes levied in the usual way. *Milwaukee, etc. Ry. Co. v. Milwaukee*, 34 Wis. 271.

⁵ 99 Tenn. 684, 43 S. W. 115.

⁶ *Hartford v. Hartford Theological Seminary*, 66 Conn. 475, 34 Atl. 483; *Salisbury v. Lane*, 7 Idaho, 370, 63 Pac. 383; *People v. Wabash Ry. Co.*, 138 Ill. 85, 27 N. E. 694; *People v. Ryan*, 138 Ill. 263, 27 N. E. 1095; *People v. Watseka Camp Meeting Ass'n*, 160 Ill. 576, 43 N. E. 716;

Bloomington Cemetery Ass'n v. People, 170 Ill. 377, 48 N. E. 905; *Sanitary District v. Martin*, 173 Ill. 243, 50 N. E. 201, 64 Am. St. Rep. 110; *People v. Chicago Theological Seminary*, 174 Ill. 177, 51 N. E. 198; *Chicago Theological Seminary v. People*, 189 Ill. 439, 59 N. E. 977; *In re Walker*, 200 Ill. 566, 66 N. E. 144; *Chicago v. Chicago*, 207 Ill. 37; *North Chicago Hebrew Congregation v. Garibaldi*, 70 Ill. App. 33; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa, 286, 66 N. W. 176, 35 L. R. A. 63; *Middleboro v. New South Brewing & Ice Co.*, 108 Ky. 351, 56 S. W. 427; *New Orleans v. New Orleans Coffee Co.*, 46 La. Ann. 86, 14 So. 502; *Hennepin County v. Bell*, 43 Minn. 344, 45 N. W. 615; *Washburn Memorial Orphan Asylum v. State*, 73 Minn. 343, 76 N. W. 204; *State v. Simmons*, 70 Miss. 485, 12 So. 477; *Greenville Ice & Coal Co. v. Greenville*, 69 Miss. 86, 10 So. 574; *Adams v. Yazoo & Miss. R. R. Co.*, 75 Miss. 275, 22 So. 824; *Lincoln Street Ry. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802; *Batterman v. New York*, 65 App. Div. 576, 73 N. Y. S.

property from taxation merely, does not exempt it from special assessments for local improvements.⁷ An exemption from public taxes, rates and assessments was held not to include water rates.⁸ But where the exemption was from any and all taxes or assessments, national, municipal or county, it was held to include special assessments, otherwise the word "assessments" would have no meaning or effect.⁹

Legislation which is claimed to relieve any species of property from its due proportion of the general burdens of government should be so clear that there can be neither reasonable doubt nor controversy about its terms. The language must be such as leaves no room for discussion. Doubts must be resolved against the exemption.¹⁰ If a statute gives authority for a special purpose, and thereby impliedly remits a general duty, this implied remission cannot be prolonged beyond the necessary requirements of the purpose.¹¹ A statute exempting a railroad company from liability for accidents to passengers riding on the platform of

44; *Matter of Tremont Baptist Church*, 36 Misc. 590, 73 N. Y. S. 1075; *Brown University v. Granger*, 19 R. I. 704, 36 Atl. 824, 36 L. R. A. 847; *Thurston County v. Sisters of Charity*, 14 Wash. 264, 44 Pac. 252; *Yates v. Milwaukee*, 92 Wis. 352, 66 N. W. 248; *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 16 S. C. Rep. 88, 40 L. Ed. 252; *Ford v. Delta & Pine Land Lumber Co.*, 164 U. S. 662, 17 S. C. Rep. 230, 41 L. Ed. 590; *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 23 S. C. Rep. 386.

⁷ *Chicago v. Chicago*, 207 Ill. 37; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa, 286, 66 N. W. 176, 35 L. R. A. 63; *Lake Shore & M. S. Ry. Co. v. Grand Rapids*, 102 Mich. 374, 60 N. W. 769, 29 L. R. A. 195; *Washburn Memorial Orphan Asylum v.*

State, 73 Minn. 343, 76 N. W. 204; *Clinton v. Henry County*, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415; *Yates v. Milwaukee*, 92 Wis. 352, 66 N. W. 248; *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 17 S. C. Rep. 230, 41 L. Ed. 590.

⁸ *Batterman v. New York*, 65 App. Div. 576, 73 N. Y. S. 44.

⁹ *District of Columbia v. Sisters of Visitation*, 15 App. Cas. (D. C.) 300.

¹⁰ *Bailey v. Magwire*, 22 Wall. 226, 22 L. Ed. 850; *Vicksburg, etc. Ry. Co. v. Dennis*, 116 U. S. 665, 6 S. C. Rep. 625, 29 L. Ed. 770; *Yazoo R. R. Co. v. Thomas*, 132 U. S. 174, 10 S. C. Rep. 68, 33 L. Ed. 302. See *Gray v. La Fayette Co.*, 65 Wis. 567, 27 N. W. 311.

¹¹ *Williams v. Tripp*, 11 R. I. 447.

cars,¹² limiting individual liability of partners in limited partnerships,¹³ and according to some cases, and probably contrary to the weight of authority, laws exempting certain property of debtors from execution,¹⁴ laws providing for stay of proceedings in favor of persons enlisted in the army,¹⁵ — are construed strictly. So are provisions relating to disabilities, saving rights of action, and extending the time for their assertion;¹⁶ and provisions exonerating ship-owners for damages caused their ships through the faults of pilots whom they are compelled to employ.¹⁷

§ 540. Illustrations.—An act extending the limits of a city provided that no lands annexed which were not laid off into lots of ten acres or less, and “which shall also in good faith be occupied and used for agricultural or horticultural purposes,” shall be taxable for any city purpose, except that it may be taxed for road purposes the same as though it was not annexed. A tract of ninety-five acres acquired for speculation and used temporarily for agricultural purposes was held not to be used in *good faith* for agricultural purposes and, therefore, not to be exempt from city taxes.¹⁸ The exemption of “institutions of purely public charity” does not cover property in which the funds of such institutions are invested for income.¹⁹ A home for aged free masons and to which none but masons were admitted was held not to be an “institution of purely public charity”

¹² *Willis v. Railroad Co.*, 32 Barb. 398.

¹³ *Andrews v. Schott*, 10 Pa. St. 47; *Vandike v. Roskam*, 67 id. 330; *Maloney v. Bruce*, 94 id. 249; *Eliot v. Himrod*, 108 id. 560.

¹⁴ *Re Lammer*, 7 Biss. 269, Fed. Cas. No. 8031; *Rue v. Alter*, 5 Denio, 119; *post*, § 598. See *Carpenter v. Herrington*, 25 Wend. 370, 37 Am. Dec. 239; *Kinard v. Moore*, 3 Strob. 193.

¹⁵ *Breitenbach v. Bush*, 44 Pa. St. 313, 84 Am. Dec. 442.

¹⁶ *Carlisle v. Stitler*, 1 Pen. & W. 6; *Thompson v. Smith*, 7 Serg. & R. 209, 16 Am. Dec. 453; *Rankin v. Tenbrook*, 6 Watts, 388; *Marple v. Myers*, 12 Pa. St. 122; *Rider v. Maul*, 46 id. 376.

¹⁷ *The Protector*, 1 W. Rob. 45; *The Diana*, 4 Moore, P. C. 11; *The Jona*, L. R. 1 P. C. 426.

¹⁸ *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa, 286, 66 N. W. 176, 85 L. R. A. 63.

¹⁹ *Trustees v. Bohler*, 80 Ga. 150, 7 S. E. 633.

within such an exemption provision. "A charity," says the court, "may restrict its admissions to a class of humanity and still be public; it may be for the blind, the mute, those suffering under special diseases; for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, (?) and as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may directly be benefited, it is public. But where the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which concerns not the public at large."²⁰ A statute exempted from taxation the capital stock and dividends thereon and the road and fixtures, depots, work-shops, warehouses and vehicles of transportation of a railroad company, and also provided that no tax should be imposed upon such stock, dividends, property or estate. It was held that the franchise and surplus of the company were not exempt and that it was not exempt from the payment of a privilege tax.²¹ Where lands granted to a railway company were exempt from taxation *until sold and conveyed*, it was held that they ceased to be exempt when the full equitable title was transferred by the company, though it might retain the legal title.²² A provision in the charter of a railroad company exempting its property from taxation does not cover lines leased by it.²³ There is no implied exemption of the property of a railroad company, brought into existence by means of county bonds issued in aid of the road, from a tax to pay such bonds.²⁴

A statute authorizing municipal corporations to exempt

²⁰ Philadelphia v. Masonic Home, 160 Pa. St. 572, 28 Atl. 954, 40 Am. St. Rep. 736.

²¹ Knoxville & Ohio R. R. Co. v. Harris, 99 Tenn. 684, 43 S. W. 115.

²² Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526, 16 S. C. Rep. 88, 40 L. Ed. 252.

²³ Lake Shore & M. S. Ry. Co. v. Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195.

²⁴ State v. Keokuk & W. R. R. Co., 153 Mo. 157, 54 S. W. 559, 77 Am. St. Rep. 704.

manufacturing establishments from municipal taxes for five years, in order to induce their location in the city, does not authorize the grant of such exemption to a concern already established.²⁵ The exemption of church property does not cover a camp-meeting ground.²⁶ The exemption of property used exclusively for public purposes does not cover property owned by private parties and leased for public purposes.²⁷ The exemption from a transfer tax of any property bequeathed "to any religious corporation" was held to mean only such corporations as were organized under the laws of the state.²⁸ The charter of a bank provided that "the capital of said bank shall be exempt from any tax laid by the state, or by any parish or body politic, under the authority of the state, during the continuance of its charter." The provision was held sufficient to exempt the bank both from a property tax and from a license or occupation tax.²⁹ "The word *any*," said the court, "excludes selection or distinction. It declares the exemption without limitation." The exemption of the lot with the buildings thereon used for school purposes does not include the personal property in the building.³⁰ A statute exempting from taxation "hospitals for the care of the sick, whether supported in whole or in part by charity," was held to exempt only the building and not the ground on which it was situated.³¹ This decision was based largely on the fact that the same act, in providing for the exemption of public buildings, expressly included the ground attached. A seminary of learning was held to be a scientific institution within a statute which

²⁵ *Middleboro v. New South Brewing & Ice Co.*, 108 Ky. 351, 56 S. W. 427.

²⁶ *People v. Watseka Camp Meeting Ass'n*, 160 Ill. 576, 43 N. E. 716.

²⁷ *State v. Cooley*, 62 Minn. 183, 64 N. W. 379. To same effect, *Hennepin County v. Bell*, 43 Minn. 344, 45 N. W. 615.

²⁸ *Matter of Taylor*, 80 Hun, 589, 30 N. Y. S. 582.

²⁹ *Citizens' Bank v. Parker*, 192 U. S. 73, reversing *State v. Citizens' Bank*, 52 La. Ann. 1086, 27 So. 709.

³⁰ *Kansas City v. Kansas City Medical College*, 111 Mo. 141, 20 S. W. 35.

³¹ *Thurston County v. Sisters of Charity*, 14 Wash. 264, 44 Pac. 252.

exempted from taxation the real estate of literary, benevolent, charitable and scientific institutions.³²

The charter of a theological seminary provided "that the property of whatever kind or description belonging or appertaining to said seminary shall be forever free and exempt from all taxation for all purposes whatever." It was held that the exemption extended only to property used directly for the corporate purposes of the seminary and not to property held as an investment.³³ The case was affirmed by the supreme court of the United States.³⁴ In both courts it was held to make no difference that the charter provided that it should be liberally construed for the purposes therein expressed; that this only applied after the purpose to exempt had been ascertained and defined. The charter of Brown University provided that "the college estate" should be exempt from all taxes and that the charter should be liberally construed in favor of the university. The supreme court of Rhode Island held that while, as a general rule, a statute whereby a state has abrogated a part of its sovereign power is to be strictly construed, yet here the charter had laid down a different rule, and that the exemption extended to all the property of the university, including that held as an investment.³⁵

The grant to one corporation of all the rights, powers and privileges possessed by another does not carry an exemption from taxation which has been conferred upon the latter.³⁶

§ 541 (365). Acts delegating the power of taxation.— Acts of this class are construed with great strictness. Two concurring principles leading to strict construction apply. Such acts affect arbitrarily private property, and are grants

³² *Detroit Home School v. Detroit*, 76 Mich. 521, 43 N. W. 593.

³³ *People v. Chicago Theological Seminary*, 174 Ill. 177, 51 N. E. 198.

³⁴ *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 23 S. C. Rep. 386.

³⁵ *Brown University v. Granger*, 19 R. I. 704, 36 Atl. 824, 36 L. R. A. 847.

³⁶ *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75; *State v. Mercantile Bank*, 95 Tenn. 212, 31 S. W. 989.

of power. "The power to lay taxes," says the supreme court of Ohio, "is one of the highest attributes of sovereignty. It involves the right to take the private property of the citizen without his consent and without other consideration than the promotion of the public good. Such interference with the natural right of acquisition and enjoyment guaranteed by the constitution can only be justified when public necessity clearly demands it. Being a sovereign power, it can only be exercised by the general assembly when delegated by the people in the fundamental law; much less can it be exercised by a municipal corporation without a further unequivocal delegation by the legislative body."³⁷ The power can be delegated by the legislature,³⁸ but only in plain and unambiguous words.³⁹ Statutes for that purpose will be construed strictly, and they must be closely pursued; a departure in any material part will be fatal.⁴⁰ Any doubt

³⁷ *Mays v. Cincinnati*, 1 Ohio St. 269, 273; *Bennett v. Birmingham*, 31 Pa. St. 15; *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828.

³⁸ *St. Louis v. Laughlin*, 49 Mo. 559; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *Williamson v. New Jersey*, 130 U. S. 189, 9 S. C. Rep. 453, 32 L. Ed. 915.

³⁹ *St. Louis v. Laughlin*, 49 Mo. 559; *Douglass v. Mayor, etc.*, 18 Cal. 643; *Harding v. Bader*, 75 Mich. 316, 42 N. W. 942; *Matter of 2d Ave. M. E. Church*, 66 N. Y. 395.

⁴⁰ *Judge of Campbell County Court v. Taylor*, 8 Bush, 206; *Sharp v. Johnson*, 4 Hill, 92, 40 Am. Dec. 259; *Lake v. Williamsburgh*, 4 Denio, 520; *Hewes v. Reis*, 40 Cal. 255; *Holland v. Mayor, etc.*, 11 Md. 186, 69 Am. Dec. 195; *Clark v. Washington*, 12 Wheat. 40, 6 L. Ed. 544; *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719; *Reed v.*

Toledo, 18 Ohio, 161; *Jonas v. Cincinnati*, id. 318; *Mays v. Cincinnati*, 1 Ohio St. 268; *Nichol v. Nashville*, 9 Humph. 252; *Kniper v. Louisville*, 7 Bush, 599; *Broadway Bap. Church v. McAtee*, 8 Bush, 508; *Clark, Dodge & Co. v. Davenport*, 14 Iowa, 494; *United States v. Mayor, etc.*, 2 Am. L. Reg. (N. S.) 394 and note; *St. Charles v. Nolle*, 51 Mo. 122, 124; *Bennett v. Birmingham*, 31 Pa. St. 15; *Henry v. Chester*, 15 Vt. 460; *Rex v. Liverpool*, 4 Burr. 2244; *Ryerson v. Laketon*, 52 Mich. 509, 18 N. W. 241; *Folkerts v. Power*, 42 Mich. 283, 3 N. W. 857; *Houghton County v. Auditor-Gen.*, 41 Mich. 28; *Cruger v. Dougherty*, 43 N. Y. 107, 121; *Sharp v. Speir*, 4 Hill, 76, 83; *Beaty v. Knowler*, 4 Pet. 152, 7 L. Ed. 813; *Board of County Commissioners v. Pueblo, etc. R. R. Co.*, 3 Colo. App. 398, 33 Pac. 682; *Ex parte Simms*, 40 Fla. 432, 25 So.

or ambiguity arising out of the terms used by the legislature must be resolved in favor of the public.⁴¹ Accordingly it is held that under authority to levy a tax and to sell property for non-payment land cannot be sold for a delinquent assessment.⁴² A power to tax or entirely suppress all petty groceries will not authorize a grant of licenses for retailing.⁴³ A power to tax for repaving streets will not include an original paving.⁴⁴ A charter power to a municipal corporation to tax hacks, drays, etc., within the city does not authorize a tax on outside residents engaged in hauling into and out of the city, and even an express grant of such power to tax would be void as an unconstitutional taking of private property for public use.⁴⁵ Authority to tax "auctioneers, grocers, merchants, retailers, hotels, . . . hackney carriages, omnibuses, carts, drays and other vehicles, and all other business, trades, avocations or professions whatever," held not to include attorneys at law.⁴⁶ A city charter conferred power to tax a great number of specified occupations including "merchants." Produce dealers or commission merchants were held to come under the latter category.⁴⁷

280; *Drummer v. Cox*, 165 Ill. 648, 46 N. E. 716; *Peoria & Pekin Union Ry. Co. v. People*, 198 Ill. 318, 64 N. E. 969; *People v. Atchison, etc. Ry. Co.*, 201 Ill. 365, 66 N. E. 232; *Bickerdike v. Chicago*, 203 Ill. 636, 68 N. E. 161; *Cleveland, C., C. & St. L. Ry. Co. v. People*, 205 Ill. 582, 69 N. E. 89; *People v. Glenn*, 207 Ill. 50; *Gill v. Patton*, 118 Iowa, 88, 91 N. W. 904; *St. Joseph v. Landis*, 54 Mo. App. 315; *Westport v. Whiting*, 62 Mo. App. 647; *Noll v. Morgan*, 82 Mo. App. 112; *Commercial Bank v. Sandford*, 103 Fed. 98; *Cache Co. v. Jensen*, 21 Utah, 207, 61 Pac. 303.

⁴¹ *Id.*; *Kansas City v. Lorber*, 64 Mo. App. 604; *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574.

⁴² *Sharp v. Speir*, 4 Hill, 76; *City of Fairfield v. Ratcliff*, 20 Iowa, 396.

⁴³ *Leonard v. Canton*, 35 Miss. 189.

⁴⁴ *Holland v. Mayor, etc.*, 11 Md. 186, 69 Am. Dec. 195.

⁴⁵ *St. Charles v. Nolle*, 51 Mo. 122, 124; *Bennett v. Birmingham*, 31 Pa. St. 15.

⁴⁶ *St. Louis v. Laughlin*, 49 Mo. 559; *Trustees, etc. v. Osborne*, 9 Ind. 458. As to application of the doctrine of *ejusdem generis*, see *Littlefield v. Winslow*, 19 Me. 394; *Foster v. Blount*, 18 Ala. 689; *Grumley v. Webb*, 44 Mo. 458, 100 Am. Dec. 304; *Sedgw.* 423; *ante*, § 422. See *State v. Robinson*, 43 Minn. 107, 43 N. W. 833.

⁴⁷ *Kansas City v. Lorber*, 64 Mo. App. 604.

Power to tax trades, professions, franchises and incomes was held to include any employment or business undertaken for gain or profit.⁴⁸ Power to tax the inhabitants of a city and those doing business therein was held to include street railroads, whether wholly within the city or extending beyond its limits.⁴⁹ A statute in relation to municipal water-works authorized the municipality "to tax, assess and collect from the inhabitants thereof such tax, rent or rates, for the use and benefit of water used or supplied to them by such water-works," as the common council or board of trustees might deem just and expedient. The word "tax" was held not to be used in its ordinary sense, but to mean a charge for water furnished, and a tax upon all lots having a building thereon, whether the occupants used the water or not, was held to be unauthorized.⁵⁰

Where a special tax is authorized for a specified purpose, and the law is silent as to cost of collection, nothing can be added for compensation of the collector.⁵¹ It is not in the power of the common council of a city, by ordinance, to include persons as hucksters who do not fall within the ordinary meaning of that term; nor can the power of taxation upon employments, when not conferred by the charter, be resorted to as a means of preventing huckstering.⁵² Where the taxing power was authorized to be exercised after a majority of the legal voters of a county named had voted in favor of a specified proposition, it was held that this was a condition precedent, and that it was not fulfilled by a submission to the voters of such county excepting those in a city therein.⁵³

Special assessments are a species of taxation, and power

⁴⁸ *State v. Worth*, 116 N. C. 1007, 21 S. E. 204.

⁴⁹ *Savannah, T. & I. H. Ry. Co. v. Savannah*, 112 Ga. 164, 37 S. E. 393.

⁵⁰ *Lemont v. Jenks*, 197 Ill. 363, 64 N. E. 362, 90 Am. St. Rep. 172.

⁵¹ *Jonas v. Cincinnati*, 18 Ohio, 318.

⁵² *Mays v. Cincinnati*, 1 Ohio St. 268.

⁵³ *Judge of Campbell County Court v. Taylor*, 8 Bush, 206.

to levy such assessments will be strictly construed.⁵⁴ The power to levy special assessments is not included in a general authority to levy taxes.⁵⁵ A statute in reference to special assessments for local improvements provided that in cities of a certain class no assessment upon a lot should exceed one-fourth the value of the lot after the improvement was made. A statute concerning sewers provided that the assessment for a main sewer should not exceed the cost of a street drain sufficient for the abutting property and that in no case should the assessment exceed two dollars per front foot. It was held that all the limitations applied to a sewer assessment, that the rule of strict construction applied, and that all doubts were to be resolved in favor of the property owner.⁵⁶ The charter of St. Louis provided that when a special assessment exceeded one-fourth the assessed value of any property, the excess should be paid out of the general revenues. By a general law land and the improvements thereon were assessed as a unit. It was held that the former statute referred to the value of both land and building.⁵⁷ Where the municipality was authorized to assess the cost of street improvements against "each owner and lot or parcel of land" abutting on the improvement, it was held that a railroad right of way abutting on a street, and in which right of way the company had an easement only, was not subject to assessment.⁵⁸ Power to assess "tracts of land" was held to include the easement of a street railway in a street.⁵⁹

⁵⁴ *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. 234; *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524; *Cincinnati v. Conover*, 55 Ohio St. 82, 44 N. E. 582; *Conner v. Paris*, 87 Tex. 32, 27 S. W. 88; *Greensboro v. McAdoo*, 112 N. C. 359, 17 S. E. 178; *Gill v. Patton*, 118 Iowa, 88, 91 N. W. 904.

⁵⁵ *Chicago, R. I. & P. Ry. Co. v. Ottumwa*, 112 Iowa, 300, 83 N. W. 1074, 51 L. R. A. 63.

⁵⁶ *Cincinnati v. Conover*, 55 Ohio St. 82, 44 N. E. 582.

⁵⁷ *Mound City Construction Co. v. Macgurn*, 97 Mo. App. 403, 71 S. W. 460.

⁵⁸ *Chicago, R. I. & P. Ry. Co. v. Ottumwa*, 112 Iowa, 300, 83 N. W. 1074, 51 L. R. A. 63.

⁵⁹ *Storrie v. Houston City St. Ry. Co.*, 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716.

§ 542 (366). **Statutes against common right.**—Statutes against common right are those which operate exceptionally to the prejudice of particular persons; not laws of general application which happen to harshly affect a few individuals on account of their exceptional condition, but laws which do not have such an application; those which operate, when they apply at all, to a few, while the rest of the community is exempt. Such statutes are construed strictly.⁶⁰ Of this nature is a statute obliging an attorney, on request or nomination of a court, to take charge of a lawsuit gratuitously.⁶¹ An act conferring privileges in a stream in derogation of common right will be strictly construed.⁶² The act incorporating the Cayuga Bridge Company contained a provision that it should not be lawful for any person or persons to erect any bridge or establish any ferry within three miles of the company's bridge, nor be lawful for any person to cross the lake except in his own boat within that distance without paying toll to the company. The provision was construed strictly and held not to apply to a person who crossed the lake within that distance on the ice.⁶³ The court say statutes cannot take away a common right unless the intention is manifest; and, when not remedial, are not to be extended even by equitable principles.⁶⁴ Towns being under no obligation, except that created by law, to support paupers, a case must be brought strictly within the provisions of the law before the duty arises; and an approxima-

⁶⁰ *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Mayor, etc. v. Hartridge*, 8 Ga. 23; *Young v. McKenzie*, 3 Ga. 40; *Marsh v. Nelson*, 101 Pa. St. 51; *Rothgerber v. Dupuy*, 64 Ill. 452; *Walker v. Chicago*, 56 Ill. 277; *Carberry v. People*, 39 Ill. App. 506; *St. Louis River Dalles Imp. Co. v. Nelson Lumber Co.*, 51 Minn. 10, 52 N. W. 976; *International Trust Co. v. Am. Loan & T. Co.*, 62 Minn. 501, 65 N. W. 632; *Brooklyn & Rock-*

away Beach R. R. Co. v. Long Isl. and R. R. Co., 72 App. Div. 496, 76 N. Y. S. 777; *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417; *Boyd v. Redd*, 120 N. C. 335, 27 S. E. 35, 58 Am. St. Rep. 792.

⁶¹ *Webb v. Baird*, 6 Ind. 13.

⁶² *State v. Elk Island Boom Co.*, 41 W. Va. 796, 24 S. E. 590.

⁶³ *Sprague v. Birdsall*, 2 Cow. 419.

⁶⁴ *Coolidge v. Williams*, 4 Mass. 140; *Melody v. Reab*, id. 473.

tion, however near, will not be sufficient.⁶⁵ Questions of legal settlement depend, therefore, upon a strict and precise application of positive law.⁶⁶ Where the settlement depended by the language of the statute on having an estate the principal of which shall be set at 60% or the income at 3%, in the valuation of estates by assessors, and be assessed for the same for the space of five years successively in the town where a person dwelt, it was not enough that he had an estate of that value not assessed at all.⁶⁷ The right to impress property to be used for the taking care of persons infected with sickness dangerous to public health can only be exercised when expressly granted.⁶⁸

§ 543 (367). Statutes are not unfrequently enacted for police purposes which by their terms must operate to the special prejudice of persons in particular situations, for the common good. In a certain sense these are statutes against common right; and though the power to pass them is unquestionable, they should only operate within their strict letter, interpreted according to their plain intent. For the protection of a harbor the legislature may forbid the removal of stones, gravel or sand from the beach by the owner.⁶⁹ Restrictions on the building or repairing of wood structures in the populous part of a city, commonly designated as fire limits, are invasions of private right, and to be strictly confined to their literal import.⁷⁰ Laws in restraint of trade, or the alienation of property,⁷¹ or those which abridge the privilege or right of giving evidence,⁷² will be construed strictly. So of a statute requiring of

⁶⁵ *Danvers v. Boston*, 10 Pick. 513.

⁶⁶ *Id.*; *Billerica v. Chelmsford*, 10 Mass. 394.

⁶⁷ *Monson v. Chester*, 22 Pick. 385.

⁶⁸ *Pinkham v. Dorothy*, 55 Me. 135; *Mitchell v. Rockland*, 45 id. 496.

⁶⁹ *Commonwealth v. Tewksbury*, 11 Met. 55.

⁷⁰ *Stewart v. Commonwealth*, 10 Watts, 307; *Brady v. Northwestern*

Ins. Co., 11 Mich. 425, 451; *Booth v. State*, 4 Conn. 65; *Tuttle v. State*, id. 68.

⁷¹ *Richards v. Emswiler*, 14 La. Ann. 658; *Sewall v. Jones*, 9 Pick. 412; *Gunter v. Leckey*, 30 Ala. 591.

⁷² *Smith v. Spooner*, 3 Pick. 229; *Pelham v. Messenger*, 16 La. Ann. 99.

suitors a test oath.⁷³ An act placing Indians under certain disabilities in respect to selling or devising their land was held not to be strictly construed, especially if, by such construction, the object of the legislature would be defeated; protective and remedial statutes imposing disabilities upon persons for their benefit ought to receive a liberal construction.⁷⁴

§ 544 (368). *Statutes of limitation.*—Statutes limiting the right to bring actions to particular periods are restrictive and will not be extended to any other than the cases expressly provided for,⁷⁵ and the exceptions are allowed a liberal effect;⁷⁶ though not so liberal as to embrace cases within the reason when not within the letter of them.⁷⁷ The exception of actions which concern the trade of merchandise between merchants is confined to actions on open and current accounts; it does not extend to accounts *stated*. It must be a direct concern of trade; liquidated demands, or bills and notes, which are only traced to the trade of merchandise are too remote to come within this description.⁷⁸ When the statute contains no exception, as a general rule the courts will not make any.⁷⁹ But the supreme court of Iowa has held that “where the party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment prevented such other from

⁷³ *Harrison v. Leach*, 4 W. Va. 383.

⁷⁴ *Doe v. Avaline*, 8 Ind. 6, and note. See *Smith v. Spooner*, 3 Pick. 229.

⁷⁵ *Miller v. Board of Supervisors*, 68 Miss. 88, 8 So. 269; *Davenport v. Hannibal*, 120 Mo. 150, 25 S. W. 364; *Bedell v. Janney*, 9 Ill. 193; *Dela-ware, etc. R. R. Co. v. Burson*, 61 Pa. St. 369; *Pearl v. Conley*, 7 Sm. & M. 358; *Wood on St. Lim.*, § 4.

⁷⁶ *Roddam v. Morley*, 1 De G. & J. 1.

⁷⁷ *Sacia v. De Graaf*, 1 Cow. 356. See *post*, §§ 601, 602.

⁷⁸ *Ramchander v. Hammond*, 2 John. 200.

⁷⁹ *Kilpatrick v. Byrne*, 25 Miss. 571; *Semmes v. Hartford Ins. Co.*, 13 Wall. 158, 20 L. Ed. 490; *Warfield v. Fox*, 53 Pa. St. 382; *The Sam Slick*, 2 Curtis, C. C. 480; *Wells v. Child*, 12 Allen, 333; *Dozier v. Ellis*, 28 Miss. 730; *Favorite v. Booher*, 17 Ohio St. 548; *Pryor v. Ryburn*, 16 Ark. 671; *Howell v. Hair*, 15 Ala. 194; *Baines v. Williams*, 3 Ired. L. 481.

obtaining knowledge thereof, the statute will only commence to run from the time the right of action was discovered, or might, by the use of diligence, have been discovered.”⁸⁰ Where a statute allowed suit to be commenced within two years after the discovery of a cause of action which had been fraudulently concealed, the court held that it was not meant to help those who took no pains to see what was before their eyes.⁸¹

There has been held to be an implied suspension of such statutes during the late civil war as to citizens of different states between which intercourse was interrupted, on the ground of paramount necessity, and limited by such necessity.⁸² Being statutes of repose, they are not regarded in modern times with disfavor; and are therefore not to be defeated by undue strictness of construction.⁸³ Heath, J., said these statutes ought to receive a strict construction.⁸⁴ But this has not been the uniform expression of English judges. Dallas, C. J., said: “I cannot agree in the position that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to receive a beneficial construction with a view to the mischief intended to be remedied.”⁸⁵ Like views have been expressed in this country. “The statute of limitations is entitled to the same respect with other statutes and ought not to be explained away.”⁸⁶ Such statutes were not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been

⁸⁰ *District Township v. French*, 53 id. 61; *Coleman v. Holmes*, 44 Ala. 124.
⁸¹ *Iowa*, 601; *Carrier v. Chicago, etc. Ry. Co.*, 79 Iowa, 80, 44 N. W. 203, 6 L. R. A. 799.

⁸² *Purdon v. Seligman*, 78 Mich. 132, 43 N. W. 1045.

⁸³ *Levy v. Stewart*, 11 Wall. 244, 20 L. Ed. 86; *Ross v. Jones*, 22 Wall. 576, 27 L. Ed. 730; *Smith v. Charter Oak Ins. Co.*, 64 Mo. 330; *Stiles v. Easley*, 51 Ill. 275; *Mixer v. Sibley*,

⁸⁴ *Toll v. Wright*, 37 Mich. 93; *Palmer v. Palmer*, 36 id. 487, 24 Am. Rep. 605.

⁸⁵ *Roe v. Ferrars*, 2 B. & P. at p. 547.

⁸⁶ *Tolson v. Kaye*, 3 Brod. & B. at p. 222.

⁸⁷ *Clementson v. Williams*, 8 Cranch, 72, 3 L. Ed. 491.

discharged, but the evidence of discharge may be lost.⁸⁷ Story, J., in *Bell v. Morrison*,⁸⁸ said: "It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them."⁸⁹ Such statutes rest upon sound policy and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction to evade their effect.⁹⁰ This class of statutes has a harsh effect on the creditor, which consideration leads to a strict construction; and a debtor who takes advantage of long forbearance to be utterly discharged on his own account has little right to favor; but all persons are not provident enough to have indestructible evidence of all their transactions, and it is for the general good that a period be fixed after which there is an arbitrary exemption from liability. In this sense these statutes are remedial, to afford protection against stale claims, after a period sufficient to the diligent, and when in the majority of instances a defending party would be placed at a disadvantage by reason of the delay.

§ 545 (369). **Limitations as to new trials and appeals.** Provisions which limit in point of time the right to move for a new trial, or to take an appeal, are construed with strictness in favor of the party desiring a review, when the time is to be computed from notice of the judgment to be given by the opposite party. The right of appeal is general and positive, and as statutes of limitation are in restraint of

⁸⁷ *Id.*

⁸⁸ 1 Pet. 351, 7 L. Ed. 174.

⁸⁹ See *Willison v. Watkins*, 3 Pet. 43, 54, 7 L. Ed. 596.

⁹⁰ *McCluny v. Silliman*, 3 Pet. 270, 7 L. Ed. 676; *United States v. Wilder*, 13 Wall. 254, 20 L. Ed. 631.

that right they are, as already said, to be construed strictly.⁹¹ Although it be admitted that notice means knowledge, it by no means follows that knowledge or information of any kind will suffice — notice to limit the right in question must be given. This implies a positive act of the party in whose favor the judgment has been rendered. “It is highly proper,” says Savage, C. J., “that such should be the practice. Notice in such a case ought not to depend upon casual information or an advertisement in the newspapers. Such notice certainly cannot be considered notice given by one party to the other. It is clear to my mind that the legislature intended a regular, formal, written notice.”⁹² Where an appeal was required to be taken within “thirty days after written notice of the judgment or order shall have been given to the party appealing,” it was held that unless, after the judgment or order and its entry, the party has some written notification thereof by the act of the prevailing party or his attorney, the time to appeal continues without limitation. The party may acquire a knowledge of the order, he may examine it on the files of the court or on its records, or procure a copy of it from the clerk; but as a limitation of the time to appeal, knowledge so acquired will be wholly inoperative.⁹³ Such a notice must be given, though the order or judgment appealed from was entered by the appellant himself;⁹⁴ or though he was in court and heard the judgment pronounced and even asked for a stay of proceedings.⁹⁵ Service of a report containing a recital of the judgment or order will not be sufficient.⁹⁶ Where a statute required a motion for a new trial to be signed within four days after the trial, it was held that an unsigned motion filed within the time could be signed after it had expired, with the leave of court;⁹⁷ also that a motion could not be

⁹¹ *Pease v. Howard*, 14 John. 479.

⁹⁴ *Rankin v. Pine*, 4 Abb. Pr. 309.

⁹² *Jenkins v. Wild*, 14 Wend. 539,
545.

⁹⁵ *Biagi v. Howes*, 66 Cal. 469.

⁹⁶ *Matter of N. Y. Cent. etc. R. R.*
Co., 60 N. Y. 112.

⁹³ *Fry v. Bennett*, 16 How. Pr. 402;
Valton v. National Loan, etc. Co.,
19 id. 515.

⁹⁷ *Reamer v. Morrison Express-*
Co., 93 Mo. App. 501, 67 S. W. 718.

amended after the four days by adding a new ground for the motion.⁹⁸

§ 546 (370). **Statutes interfering with legitimate industries, etc.**—All statutes for interference with legitimate industries or the ordinary uses of property, or for its removal or destruction for being a nuisance or contributory to public evil, are treated with a conservative regard for the liberty of the citizen in his laudable business, and in the innocent enjoyment of his possessions, and generally the rights of property. Such interferences are cautiously justified on principles of the common law, and only in cases of imperative necessity,⁹⁹ or under valid statutes plainly expressing the intent.¹

§ 547 (371). **Statutes creating liability.**—If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed.²

⁹⁸ Hesse v. Seyp, 88 Mo. App. 66.

⁹⁹ Mayor, etc. of New York v. Lord, 18 Wend. 128; Respublica v. Sparhawk, 1 Dall. 357; Russell v. Mayor, etc., 2 Denio, 461, 474.

¹ Re Jacobs, 98 N. Y. 98; People v. Marx, 99 id. 377, 2 N. E. 29, 52 Am. Rep. 34; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Brigham v. Edmunds, 7 Gray, 359; Austin v. Murray, 16 Pick. 121; Welch v. Stowell, 2 Doug. (Mich.) 332; Walker v. Board of Public Works, 16 Ohio, 540; Wynehamer v. People, 13 N. Y. 373; Port Wardens of N. Y. v. Cartwright, 4 Sandf. 236; Stevens v. State, 2 Ark. 291, 35 Am. Dec. 72; Thorpe v. R. & B. R. R. Co., 27 Vt. 140; Miller v. Craig, 11 N. J. Eq. 175; Bartemeyer v. Iowa, 18 Wall. 129, 137, 21 L. Ed. 929; Mugler v. Kansas, 123 U. S. 623, 661, 8 S. C. Rep. 273, 31 L. Ed. 205; Watertown v. Mayo, 109 Mass. 315, 319; Slaughter House Cases, 16 Wall. 36, 21 L.

Ed. 394; State v. Gilman, 33 W. Va.

146; 41 Alb. L. J. 24; Hughes v. Chester, etc. Ry. Co., 8 Jur. (N. S.) 221; S. C., 3 De Gex, F. & J. 352; Mayor, etc. v. Davis, 6 W. & S. 269; Commonwealth v. Sylvester, 13 Allen, 247; Shiel v. Mayor, etc., 6 H. & N. 796; Wiener v. Davis, 18 Pa. St. 331; McGlade's Appeal, 99 Pa. St. 333; Cooley's Const. Lim., ch. XVI.

² Cohn v. Neeves, 40 Wis. 393; Steamboat Ohio v. Stunt, 10 Ohio St. 582; Moyer v. Penn. Slate Co., 71 Pa. St. 293; Lane's Appeal, 105 id. 49, 51 Am. Rep. 156; O'Reilly v. Bard, 105 Pa. St. 569; Hollister v. Hollister Bank, 2 Keyes, 245; Matter of Hollister Bank, 27 N. Y. 383, 84 Am. Dec. 292; McFerren v. Umatilla County, 27 Ore. 311, 40 Pac. 1013; Hughes v. Western Union Tel. Co., 79 Mo. App. 133; Moran v. St. Paul, 54 Minn. 279, 56 N. W. 80; Bryson v. Johnson County, 100 Mo.

A statute, even when it is remedial, must be followed with strictness, where it gives a remedy against a party who would not otherwise be liable.³ The courts will not extend or enlarge the liability by construction; they will not go beyond the clearly expressed provisions of the act.⁴ Statutes are construed strictly against a forfeiture.⁵ A statute which subjects one man's property to be affected by, charged or forfeited for the acts of another, on grounds of public policy, should be strictly construed; it cannot be done by implication.⁶ So of a statute which deprives passengers riding on the platform of cars of compensation for injuries.⁷ Statutes for the discharge of insolvent debtors are in derogation of the rights of the creditor, and should on principle be construed strictly. Lord Holt said: "Let a statute be ever so charitable, if it gives away the property of the subject it ought not to be countenanced."⁸

§ 548 (378). **Public grants.**—The words of a private grant are taken most strongly against the grantor,⁹ though if the meaning cannot be discovered the instrument is void.¹⁰ But this rule is reversed in cases of public grants. They are construed strictly in favor of the government on grounds of public policy.¹¹ If the meaning of the words be doubtful in a grant designed to be of general benefit to the public,

76, 13 S. W. 239; *Basset v. Railroad Co.*, 145 Mass. 129, 13 N. E. 370; *Blackmore v. Missouri Pac. Ry. Co.*, 162 Mo. 455, 62 S. W. 993; *Commonwealth v. Davidson*, 4 Pa. Dist. Ct. 172; *Gulf, Colo. & S. F. Ry. Co. v. Barnett*, 19 Tex. Civ. App. 626, 47 S. W. 1039.

³ *Chicago, etc. R. R. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. 213; *Steamboat Ohio v. Stunt*, 10 Ohio St. 582.

⁴ *Detroit v. Putnam*, 45 Mich. 263, 7 N. W. 815; *Detroit v. Chaffee*, 70 Mich. 80, 37 N. W. 882; *Franklin County v. McRaven*, 67 Ark. 562, 55 S. W. 930; *Saunders v. Holburn*

District Board of Works, (1895) 1 Q. B. 64.

⁵ *Brundy v. Mayfield*, 15 Mont. 201, 38 Pac. 1067; *Manhattan Trust Co. v. Davis*, 23 Mont. 273, 58 Pac. 718.

⁶ *Steamboat Ohio v. Stunt*, 10 Ohio St. 582.

⁷ *Willis v. Long Island R. R. Co.*, 32 Barb. 398.

⁸ *Calladay v. Pilkington*, 12 Mod. 513.

⁹ *Co. Lit.* 63a; *Shep. Touch.* 87.

¹⁰ *Taylor v. St. Helens*, L. R. 6 Ch. Div. 264.

¹¹ *Martin v. Waddell*, 16 Pet. 411, 10 L. Ed. 997; *Mills v. St. Clair Co.*,

they will be taken most strongly against the grantee and for the government, and therefore should not be extended by implication in favor of the former beyond the natural and obvious meaning of the words employed.¹² In *Central Transportation Co. v. Pullman's Palace Car Co.*¹³ the supreme court of the United States says: "By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of

8 How. 581, 12 L. Ed. 1201; *Binghamton Bridge*, 3 Wall. 51, 18 L. Ed. 137; *Green's Estate*, 4 Md. Ch. 349; *United States v. Arredondo*, 6 Pet. 738-9, 8 L. Ed. 547; *State v. Bentley*, 23 N. J. L. 532, 538; *Bridge Co. v. Hoboken, etc. Co.*, 13 N. J. Eq. 94; *Commonwealth v. Roxbury*, 9 Gray, 451, 492; *Slidell v. Grandjean*, 111 U. S. 412, 4 S. C. Rep. 475, 28 L. Ed. 321; *Hannibal, etc. R. R. Co. v. Packet Co.*, 125 U. S. 260, 271, 8 S. C. Rep. 874, 31 L. Ed. 731; *Currier v. Marietta, etc. R. R. Co.*, 11 Ohio St. 228; *Mayor, etc. v. Ohio, etc. R. R. Co.*, 26 Pa. St. 355; *Miners' Bank v. United States*, 1 Greene (Iowa), 553; *Mayor, etc. v. Macon, etc. R. R. Co.*, 7 Ga. 221; *Talmadge v. Coal, etc. Co.*, 3 Head, 337; *Brennan v. Bradshaw*, 53 Tex. 330, 4 S. W. 143; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Justices v. Griffin, etc. Plk. R. Co.*, 9 Ga. 475; *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319; *Gaines v. Coates*, 51 Miss. 335; *San Francisco v. Sharp*, 125 Cal. 534, 58 Pac. 173; *De Lancey v. Piepgras*, 138 N.

Y. 26, 33 N. E. 822; *Burrows v. Kimball*, 14 Utah, 149, 41 Pac. 719; *Globe Mill Co. v. Bellingham Bay Imp. Co.*, 10 Wash. 458, 38 Pac. 1112; *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 S. C. Rep. 478, 35 L. Ed. 55; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 12 S. C. Rep. 689, 36 L. Ed. 537; *Louisville & N. R. R. Co. v. Kentucky*, 161 U. S. 677, 16 S. C. Rep. 714, 40 L. Ed. 849; *Wisconsin Central R. R. Co. v. United States*, 164 U. S. 190, 17 S. C. Rep. 45, 41 L. Ed. 399; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 S. C. Rep. 718, 41 L. Ed. 1165; *State v. Coosaw Mining Co.*, 47 Fed. 225; *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334, 47 U. S. App. 36; *Scottish Drainage & Investment Co. v. Campbell*, L. R. 14 H. L. 139; *Palmer v. Hickory Grove Cem. Co.*, 84 App. Div. 600, 82 N. Y. S. 973.

¹² *Mills v. St. Clair Co.*, 8 How. 581, 12 L. Ed. 1201.

¹³ 139 U. S. 24, 11 S. C. Rep. 478, 35 L. Ed. 55.

the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms."

Any ambiguity in the terms must operate in favor of the government.¹⁴ Whatever is not unequivocally granted is taken to be withheld.¹⁵ Whether the grant be of property, franchises or privileges, it is construed strictly in favor of the public; nothing passes but what is granted in clear and explicit terms,¹⁶ but it will be construed reasonably for the purpose the act contemplates.¹⁷ The object and end of all government is to promote the happiness and prosperity of the people by which it is established; and it cannot be assumed that the government intended to diminish its power of accomplishing the end for which it was created.¹⁸ It is therefore never implied that it has surrendered, in whole or in part, any of its sovereign power of legislation for the

¹⁴ *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How. 71, 14 L. Ed. 55; *Grant v. Leach*, 20 La. Ann. 329; *McLeod v. Burroughs*, 9 Ga. 213; *Louisville & N. R. R. Co. v. Kentucky*, 161 U. S. 677, 16 S. C. Rep. 714, 40 L. Ed. 849.

¹⁵ *Holyoke Co. v. Lyman*, 15 Wall. 500, 512, 21 L. Ed. 133.

¹⁶ *Rice v. Railroad Co.*, 1 Black, 358, 380, 17 L. Ed. 147; *Ohio Life & Trust Co. v. Debolt*, 16 How. 435, 14 L. Ed. 997; *Commonwealth v. Erie, etc. R. R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471; *Stourbridge Canal v. Wheeley*, 2 Barn. & Ad. 792; *Parker v. Great W. Ry. Co.*, 7 M. & Gr. 253; *Gaines v. Coates*, 51 Miss. 335; *Green's Estate*, 4 Md. Ch. 349; *La Plaisance Bay Harbor Co. v. Mon-*

roe, Walk. Ch. (Mich.) 155; Townsend v. Brown, 24 N. J. L. 80; *Morris Canal, etc. Co. v. Central R. R. Co.*, 16 N. J. Eq. 419, 436; *Harrison v. Young*, 9 Ga. 359.

¹⁷ *Newark Plank R. Co. v. Elmer*, 9 N. J. Eq. 754; *Whittaker v. Canal Co.*, 87 Pa. St. 34; *Brocket v. Ohio & P. R. Co.*, 14 id. 241, 53 Am. Dec. 534. A charter granted by two states to a railroad company is a contract with it and also a compact between the states, and is to be liberally construed. *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84.

¹⁸ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 447, 9 L. Ed. 773, 938.

general welfare — of police, of taxation, or of eminent domain.¹⁹ In its grants of land there is implied no covenant to do or not to do any further act in relation thereto.²⁰

§ 549 (378). **Grants of franchises and privileges.**—All grants of franchises and privileges are strictly construed in favor of the public.²¹ In the grant of a public franchise to a corporation, as to build and maintain a road or bridge, or to establish a ferry, or water-works, no contract is implied that no competing franchise will be granted.²² Such grants

¹⁹ *Id.*; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *West River Bridge Co. v. Dix*, 6 How. 528, 12 L. Ed. 535; *Bridge Co. v. Hoboken, etc. Co.*, 13 N. J. Eq. 81, 94; *Rice v. R. R. Co.*, 1 Black, 358, 380, 17 L. Ed. 147; *Holyoke Co. v. Lyman*, 15 Wall. 500, 512, 21 L. Ed. 133; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Turnpike Co. v. State*, 3 Wall. 210, 18 L. Ed. 180; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391, 7 S. C. Rep. 916, 30 L. Ed. 1059.

²⁰ *Jackson v. Lamphire*, 3 Pet. 289, 7 L. Ed. 679.

²¹ *Vernon Shell Road Co. v. Savannah*, 95 Ga. 387, 22 S. E. 625; *Lincoln Street Ry. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 803; *Mitchell v. Union Electric Co.*, 70 N. H. 569, 49 Atl. 94; *New York v. Dry Dock, etc. R. R. Co.*, 47 Hun, 199; *People v. Broadway Ry. Co.*, 126 N. Y. 29, 26 N. E. 961; *Brooklyn & Rockaway Beach R. R. Co. v. Long Island R. R. Co.*, 72 App. Div. 496, 76 N. Y. S. 777; *Parkhurst v. Capital City Ry. Co.*, 23 Ore. 471, 32 Pac. 304; *Turnpike Co. v. Montgomery County*, 100 Tenn. 417, 45 S. W. 345; *Long Island Water Supply Co. v. Brook-*

lyn, 166 U. S. 685, 17 S. C. Rep. 718, 41 L. Ed. 1165.

²² *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, 938; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 7 S. C. Rep. 916, 30 L. Ed. 1059; *Tuckahoe Co. v. T. R. R. Co.*, 11 Leigh, 42, 36 Am. Dec. 374; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. 529; *State v. Cincinnati Gas Light Co.*, 18 Ohio St. 262; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 18; *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921; *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574; *Birmingham, etc. St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465, 58 Am. Rep. 615; *Brenham v. Brenham Water Co.*, 67 Tex. 542; *Grand Rapids Electric Light, etc. Co. v. Grand Rapids, etc. Co.*, 33 Fed. 659; *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 20 S. C. Rep. 40, 44 L. Ed. 92; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 22 S. C. Rep. 320, 46 L. Ed. 1132; *Skaneateles Water Works Co. v. Skaneateles*, 184 U. S. 354, 22 S. C. Rep. 400, 46 L. Ed. 585; *Joplin v. S. W. Mo. Light Co.*, 191 U. S. 150.

are not exclusive unless expressly made so,²³ and municipal corporations have no power to grant exclusive privileges unless expressly authorized so to do.²⁴

In *Stourbridge Canal v. Wheeley*²⁵ the court say: "The canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this: that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public; and the plaintiffs can claim nothing that is not clearly given to them by the act." "And the doctrine thus laid down," says Taney, C. J., speaking for the court in *Charles River Bridge v. Warren Bridge*,²⁶ "is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants to a very considerable extent in transporting large quantities of coal.

²³ *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. 94; *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114, 31 N. E. 573; *Thousand Island Park Ass'n v. Tucker*, 173 N. Y. 203, 65 N. E. 975; *Turnpike Co. v. Montgomery County*, 100 Tenn. 417, 45 S. W. 345; *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 S. C. Rep. 718, 41 L. Ed. 1165.

²⁴ *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853; *New Orleans City &*

L. R. Co. v. New Orleans, 44 La. Ann. 728, 11 So. 78; *Detroit Citizens' St. Ry. Co. v. Detroit*, 110 Mich. 384, 68 N. W. 304, 64 Am. St. Rep. 350, 35 L. R. A. 859; *Long v. Duluth*, 49 Minn. 280, 51 N. W. 224, 32 Am. St. Rep. 547; *Parkhurst v. Capital City Ry. Co.*, 23 Ore. 471, 32 Pac. 304; *State v. City of Hamilton*, 47 Ohio St. 52, 23 N. E. 935; *Brenham v. Brenham Water Co.*, 67 Tex. 542; *Gas Co. v. Parkersburg*, 30 W. Va. 435; *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921; *Detroit Citizens' St. Ry. Co. v. Detroit Ry. Co.*, 171 U. S. 43, 18 S. C. Rep. 732, 43 L. Ed. 67.

²⁵ 2 Barn. & Ad. 793.

²⁶ 11 Pet. 545, 9 L. Ed. 773, 938.

The rights of all persons to navigate the canal were expressly secured by the act of parliament, so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute in giving the right to exact the toll had given it for articles which passed 'through any one or more of the locks,' and had said nothing as to toll for navigating one of the levels, the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant, if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter." Under a grant to a plank-road company to lay its road on an established highway it is not authorized to take exclusive possession and deprive the public of its use.²⁷ Where a railroad company was authorized to construct a bridge, "provided that the said bridge be at least forty-two feet above the bed of the river," the proviso was held to be a continuing condition, requiring the bridge to be kept that much above the bed of the river.²⁸

§ 550 (379). Public grants of land in aid of railroads and for other purposes.—The foregoing principles have been steadily recognized in the construction of land grants made by the federal government in aid of railroads and other like enterprises.²⁹ These grants are laws as well as

²⁷ *Justices v. Griffin, etc. Plank R. Co.*, 9 Ga. 475. Ed. 634; *Rice v. Railroad*, 1 Black, 358, 17 L. Ed. 147; *Slidell v. Grand-*

²⁸ *State v. South Carolina Ry. Co.*, 28 S. C. 23, 4 S. E. 796. jean, 111 U. S. 412, 4 S. C. Rep. 475, 28 L. Ed. 321; *Jackson, etc. R. R.*

²⁹ *Leavenworth, etc. R. R. Co. v. United States*, 92 U. S. 733, 23 L. W. 720; *St. Paul, etc. Ry. Co. v.*

contracts, and are to be construed to effectuate the legislative intent, and this must sometimes be deduced from complex provisions. To ascertain such intent the court may look to the condition of the country when the acts were passed as well as to the purpose declared on their face, and read all parts of them together.³⁰ Grants of lands on water-courses from the state, with the appurtenances, do not convey the right of public ferry, though the right of private ferry passes with the fee.³¹ A public franchise can be created only by an act of the legislature.³² In construing an act of congress granting to a railroad company a right of way through the public lands and also the right to take timber and materials therefrom for the construction of its road, the supreme court of the United States says: "When an act, operating as a general law, and manifesting clearly the intention of congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi*-public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."³³

Phelps, 26 Fed. Rep. 569; Swann v. Jenkins, 82 Ala. 478; Dubuque, etc. R. R. Co. v. Litchfield, 23 How. 66, 16 L. Ed. 500; Nash v. Sullivan, 29 Minn. 206, 12 N. W. 698; Northern Pac. Ry. Co. v. Soderberg, 188 U. S. 526, 23 S. C. Rep. 365.

³⁰ Winona, etc. R. R. Co. v. Barney, 113 U. S. 618, 5 S. C. Rep. 606, 23 L. Ed. 1109; Jackson, etc. R. R. Co. v. Davison, 65 Mich. 416, 32 N. W. 726; Nash v. Sullivan, 29 Minn. 206, 12 N. W. 698; Schulenburg v. Harriman, 21 Wall. 44, 22 L. Ed. 551; Missouri, etc. R. R. Co. v. K.

P. R. R. Co., 97 U. S. 491, 24 L. Ed. 1095; St. Paul, etc. R. R. Co. v. Greenhalgh, 26 Fed. 563; Wolcott v. Des Moines Co., 5 Wall. 681, 18 L. Ed. 689; Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915; Dubuque R. R. Co. v. Des Moines R. R. Co., 109 U. S. 329, 3 S. C. Rep. 188, 27 L. Ed. 952; Kansas Pacific Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 S. C. Rep. 566, 23 L. Ed. 1122.

³¹ Harrison v. Young, 9 Ga. 359.

³² Clark v. Wilkie, 4 Strob. 259. See Wiswall v. Hall, 3 Paige, 313.

³³ United States v. Denver & R.

A grant of land for school purposes should be construed to carry out the intent of congress.³⁴ A grant of swamp lands to a county in consideration of the construction and maintenance of levees by the county was liberally construed in favor of the county.³⁵ Where the grant was of the right to take from the public lands *adjacent* to the right of way, stone, timber, earth and other materials for the construction and repair of its railway and telegraph lines, it was held that the right to take materials extended to the townships adjoining those through which the road ran and no further.³⁶ Lands twenty miles from the right of way are not adjacent within the statute.³⁷ Where a practical construction had been given to an ambiguous grant, in favor of the railroad company, it was adhered to, though the rule of strict construction might have required a different result.³⁸ In case of conflicting grants made at the same time the following rule has been established: "The rule is well settled that where lands are granted by acts of congress of the same date, or by the same act, to aid in the construction of two railroads that must necessarily intersect, or which are required to intersect, each grantee — the map of definite location having been filed and accepted — takes, as of the date of the grant, an equal undivided moiety of the lands within the conflicting place limits, without regard to the time of location of the respective lines."³⁹

§ 551 (380). **Acts creating municipal corporations or granting power thereto.**— Acts for the incorporation of municipal corporations and grants of power therein are to

G. Ry. Co., 150 U. S. 1, 14 S. C. Rep. 11, 37 L. Ed. 975; *United States v. Denver & R. G. Ry. Co.*, 150 U. S. 16, 14 S. C. Rep. 16, 37 L. Ed. 980.
³⁴ *Johanson v. Washington*, 190 U. S. 179.

³⁵ *Warren County v. Nall*, 78 Miss. 726, 29 So. 755.

³⁶ *Rio Grande Irr. & Col. Co. v. Gildersleeve*, 9 N. M. 12, 48 Pac.

³⁷ *United States v. St. Anthony R. R. Co.*, 192 U. S. 524.

³⁸ *Houston & Tex. Cent. Ry. Co. v. State*, 95 Tex. 507, 62 S. W. 114.

³⁹ *Sioux City & St. P. R. R. Co. v. United States*, 159 U. S. 349, 16 S. C. Rep. 17, 40 L. Ed. 177; *McCarver v. Herzberg*, 120 Ala. 524, 25 So. 3; *Galloway v. Henderson*, 136 Ala. 315, 34 So. 957.

be strictly construed.⁴⁰ And such corporations possess only such powers as are expressly conferred or necessarily implied.⁴¹ The same rule applies to counties and other *quasi*-public corporations.⁴² Doubts as to the existence of a power are resolved against the corporation.⁴³ As municipal corporations are vested with a portion of the authority which properly appertains to the sovereign power of the state, they must be confined to those powers which are clearly granted, as it is only by such grants that the government proper can delegate its just authority. Nor, as a general rule, can any evil arise from such construction, since the inhabitants of the corporation are not deprived of that protection which the state extends to her citizens in general. The power of the corporation is merely something added, as to the particular locality, to the general powers of government; or, in other words, it is a special jurisdiction, created for specified purposes, and, like all such jurisdictions, it must be confined to the subjects specially enumerated.⁴⁴

When a power is given by statute everything necessary to make it effectual is given by implication.⁴⁵ Power to purchase real estate necessary for county buildings was held to imply power to incur a debt therefor, to issue non-negotiable evidence of such debt and to levy a tax extending

⁴⁰ Commissioners v. Andrews, 18 Ohio St. 64; Treadwell v. Commissioners, 11 id. 190; Augusta & S. R. R. Co. v. City Council, 100 Ga. 701, 28 S. E. 126; Savanna v. Robinson, 81 Ill. App. 471; State v. Waddell, 49 Minn. 500, 52 N. W. 213; Westport v. Whiting, 62 Mo. App. 647; Kansas City v. Lorber, 64 Mo. App. 604; Barnett v. Maloney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541.

⁴¹ Ex parte Roach, 104 Cal. 272, 37 Pac. 1044; Lent v. Portland, 42 Ore. 488, 71 Pac. 645; Tacoma Gas & Elec. Light Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655; Detroit Cit-

izens' St. Ry. Co. v. Detroit Ry. Co., 171 U. S. 48, 18 S. C. Rep. 732, 43 L. Ed. 67.

⁴² Modoc County v. Spencer, 103 Cal. 498, 37 Pac. 483; Shelby County v. Exposition Co., 96 Tenn. 653, 36 S. W. 694, 36 L. R. A. 717.

⁴³ Savanna v. Robinson, 81 Ill. App. 471; Knapp v. Kansas City, 48 Mo. App. 485.

⁴⁴ Leonard v. Canton, 35 Miss. 189; Mills v. Williams, 11 Ired. L. 558.

⁴⁵ State v. Sinking Fund Commissioners, 1 Tenn. Cas. 490; ante, §§ 500, 512; Hoffman v. Pawnee County Com'rs, 3 Okl. 325, 41 Pac. 566.

over a series of years to pay such debt.⁴⁶ Successive statutes conferring powers upon a municipal corporation are to be taken as *in pari materia* and construed together.⁴⁷ An act to establish a board of park commissioners in certain cities of the first class and to define their powers and duties was held not to create a distinct municipal corporation, but a branch or department of the city government.⁴⁸ General statutes for the formation of municipal corporations must be strictly complied with.⁴⁹ A municipal corporation of one state has no power to bind itself to keep in repair a highway in another state and to respond in damages for a failure so to do.⁵⁰

§ 552 (384). Construction of particular powers to municipal corporations.—A city having the power to make contracts and to provide itself with water or other necessary thing is not thereby authorized to grant to a company the exclusive right to supply it for a given period.⁵¹ A statute conferring upon the common council of a city jurisdiction to judge of the election of its own members does not exclude the jurisdiction of the courts in that behalf, unless the grant of power to the council is expressly or by necessary implication exclusive.⁵² A power conferred by the

⁴⁶ Witter v. Board of Supervisors, 112 Iowa, 380, 83 N. W. 1041.

⁴⁷ Henry v. Mayor, 91 Ga. 268, 18 S. E. 143.

⁴⁸ Orvis v. Board of Park Commissioners, 88 Iowa, 674, 56 N. W. 294, 45 Am. St. Rep. 252.

⁴⁹ State v. Frost, 103 Tenn. 685, 54 S. W. 986.

⁵⁰ Becker v. La Crosse, 99 Wis. 414, 75 N. W. 84, 67 Am. St. Rep. 874, 40 L. R. A. 829.

⁵¹ Brenham v. Brenham Water Co., 67 Tex. 542; Lehigh Water Co. v. Easton, 121 U. S. 388, 7 S. C. Rep. 916, 30 L. Ed. 1059; Davenport v. Kleinschmidt, 6 Mont. 502; Saginaw

Gas Light Co. v. Saginaw, 28 Fed. 529; State v. Cincinnati Gas L. & C. Co., 18 Ohio, 262; Grand Rapids E. L. Co. v. Grand Rapids E. etc. Co., 33 Fed. 659; Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. 650; Citizens' Gas, etc. Co. v. Elwood, 114 Ind. 332, 16 N. E. 624; *ante*, § 549.

⁵² State ex rel. v. Kempf, 69 Wis. 470, 34 N. W. 226, and authorities cited. But see People v. Metzker, 47 Cal. 524; Peabody v. School Com., 115 Mass. 383; Commonwealth v. Leech, 44 Pa. St. 332; Lamb v. Lynd, *id.* 336; Commonwealth v. Meeser, *id.* 341.

charter on the common council to provide for lighting the city, and to alter lamp districts, cannot be delegated to a committee for final decision.⁵³ The power to issue bonds must be clearly given⁵⁴ and will be strictly construed.⁵⁵ But where all parties have acted in good faith and the bonds have been issued, the court will lean towards a construction that will sustain the bonds.⁵⁶ Power to issue coupon bonds running for thirty years was held to authorize negotiable bonds.⁵⁷ An act which authorized counties to refund their matured and maturing indebtedness was held to apply to future as well as to existing indebtedness.⁵⁸ An amended charter gave a city power to issue bonds from time to time to an amount not exceeding one hundred thousand dollars. This was construed to authorize an issue to the amount stated in addition to bonds already outstanding.⁵⁹ Statutes authorizing municipal aid to works of a public nature, such as a bridge, undertaken by private corporations, are not extended by implication.⁶⁰

Where a city was authorized to construct sewers and drains and to do all acts necessary to preserve the health of the city, it was held to have power to construct a sewer beyond the limits of the city to a suitable outlet.⁶¹ A power

⁵³ *Minneapolis Gas L. Co. v. Minneapolis*, 36 Minn. 159; *Russell v. Cage*, 66 Tex. 428; *Whyte v. Mayor, etc.*, 2 Swan, 364.

⁵⁴ *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, 18 S. C. Rep. 788, 42 L. Ed. 1156; *Rathbone v. Kiowa County Commissioners*, 73 Fed. 395.

⁵⁵ *Steffins v. Superior Court Judge*, 108 Mich. 693, 66 N. W. 594; *McManus v. Duluth, etc. R. R. Co.*, 51 Minn. 30, 52 N. W. 980; *State v. Moore*, 45 Neb. 12, 63 N. W. 130. Power to issue bonds was held not to include the power to make them payable in gold. *Burnett v. Ma-*

loney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541.

⁵⁶ *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, 18 S. C. Rep. 788, 42 L. Ed. 1156.

⁵⁷ *Rathbone v. Hopper*, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674.

⁵⁸ *Riley v. Garfield Township*, 54 Kan. 463, 38 Pac. 560.

⁵⁹ *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434.

⁶⁰ *Smith v. Railway & Bridge Co.*, 97 Iowa, 545, 66 N. W. 1041.

⁶¹ *Minnesota & Mont. Land & Imp. Co. v. Billings*, 111 Fed. 972, 50 C. C. A. 70.

to improve streets includes boulevards.⁶² The power to regulate the use of streets does not authorize the leasing of space to private parties.⁶³

The power to regulate includes the power to license.⁶⁴ A power to license telephone companies using the streets and to fix the license fee does not authorize a license for revenue and an annual fee of one hundred dollars was held to be unreasonable.⁶⁵ Power to suppress lotteries includes policy shops and the game of policy.⁶⁶ Under a general welfare clause the sale of liquor may be prohibited⁶⁷ and drunkenness punished.⁶⁸ A power to control and regulate the streets was held not to authorize an ordinance compelling railroads to keep flagmen at crossings.⁶⁹

§ 553. *Same.*—Power to erect, construct, build, operate and maintain a water and electric light system was held not to confer power to purchase a plant already built.⁷⁰ But a provision in the same charter authorizing the city to appropriate a part of the general revenue to the payment of the money to become due by virtue of any contract made by such city for the purchase of any water, light and power plant, then owned and operated by private parties in such city was held to imply power to purchase.⁷¹ Under a general power to contract for a supply of water for public use it was held that a city could not contract for an unreasonable period, and thirty years was held to be unreasonable.⁷²

⁶² *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427.

⁶³ *Schopp v. St. Louis*, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783.

⁶⁴ *Cairo v. Coleman*, 53 Ill. App. 680.

⁶⁵ *Sunset Tel. & Tel. Co. v. Medford*, 115 Fed. 202.

⁶⁶ *People v. Hess*, 85 Mich. 128, 48 N. W. 181.

⁶⁷ *Bagwell v. Lawrenceville*, 94 Ga. 654, 21 S. E. 903; *Paulk v. Sycamore*, 104 Ga. 728, 31 S. E. 200.

⁶⁸ *Fairmont v. Meyer*, 83 Minn. 456, 86 N. W. 457; *Green City v. Holsinger*, 76 Mo. App. 567.

⁶⁹ *Red Wing v. Chicago, etc. Ry. Co.*, 72 Minn. 240, 75 N. W. 223, 71 Am. St. Rep. 482.

⁷⁰ *Austin v. McCall*, 95 Tex. 565, 68 S. W. 791.

⁷¹ *Id.*

⁷² *Flynn v. Little Falls Elec. & Water Co.*, 74 Minn. 180, 77 N. W. 180.

A power to provide for the erection, management and regulation of slaughter-houses was held to authorize their prohibition.⁷³ A statute authorizing cities to fix the salary of the mayor within a certain maximum, graduated according to population, does not operate to fix the salary at the maximum in the absence of any ordinance, and no salary is fixed until an ordinance is passed.⁷⁴ A statute that no city, town or village should be organized within two miles of any city of the first, second or third class was held not to prevent the annexation of territory within the two miles.⁷⁵ The constitution of California provides that "any county, city, town or township may make or enforce within its limits such local, police, sanitary and other regulations as are not in conflict with general laws." This was held to have the same effect as though granted by the legislature and was construed as follows: "Full effect can be given to the section by holding that each has been given the exclusive right of legislation within its own particular boundaries. By the organization of a city within the boundaries of a county the territory thus organized is withdrawn from the legislative control of the county upon the designated subjects, and is placed under the legislative control of its own council; and the principle of local government which pervades the entire instrument is convincible of the intention to withdraw the city from the control of the county, and to deprive the county of any power to annul or supersede the regulations of the city upon the subjects which have been confided to its control."⁷⁶

§ 554 (381). **Acts creating private corporations or granting power thereto.**—The settled rule of construction of grants by the legislature to corporations, whether public or private, is that only such powers and rights can be exer-

⁷³ *St. Louis v. Howard*, 119 Mo. 41, 24 S. W. 770, 41 Am. St. Rep. 630.

⁷⁵ *Warner v. Barber Asphalt Pav. Co.*, 115 Mo. 572, 22 S. W. 490.

⁷⁶ *Ex parte Roach*, 104 Cal. 272,

⁷⁴ *State v. Olinger*, 109 Iowa, 669, 277, 37 Pac. 1044.
80 N. W. 1060.

cised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.⁷⁷ This principle is derived from the nature of corporations, the mode in which they are organized and in which their affairs must be conducted. In aggregate corporations, as a general rule, the act and will of a majority is deemed in law the act and will of the whole — as the act of the corporate body. The consequence is that a minority must be bound, not only without but against their consent. Such an obliga-

⁷⁷ *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574; *Dill. on Mun. Corp.*, §§ 22, 55 and notes; *Lima v. Cemetery Ass'n*, 5 Am. & Eng. Corp. Cas. 547, 42 Ohio St. 128, 51 Am. Rep. 802; *Bridgeport v. Railroad Co.*, 15 Conn. 475, 501; *Dugan v. Bridge Co.*, 27 Pa. St. 303; *Petersburg v. Metzker*, 21 Ill. 205; *Cleveland, etc. R. R. Co. v. Erie*, 27 Pa. St. 380; *New London v. Brainard*, 22 Conn. 552; *Hartford Bridge Co. v. Union Ferry Co.*, 29 id. 210; *Thomson v. Lee Co.*, 3 Wall. 327, 18 L. Ed. 177; *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453; *Bridge Co. v. Hoboken, etc. Co.*, 13 N. J. Eq. 81; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *People v. Utica Ins. Co.*, 15 John. 358; *Leonard v. Canton*, 35 Miss. 189; *Hodges v. Buffalo*, 2 Denio, 110; *Clark v. Davenport*, 14 Iowa, 495; *Merriam v. Moody's Ex'rs*, 25 id. 163; *Lafayette v. Cox*, 5 Ind. 38; *Smith v. Madison*, 7 id. 86; *Kyle v. Malin*, 8 id. 34, 37; *Douglass v. Placerville*, 18 Cal. 643; *Wallace v. San Jose*, 29 id. 180; *Argenti v. San Francisco*, 16 id. 282; *Nichol v. Nashville*, 9 Humph. 252; *People v. River Raisin, etc. R. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64; *Willard v. Newburyport*, 12 Pick. 227; *Keyes v. Westford*, 17 id. 273; *Commonwealth v. Turner*, 1 Cush. 493; *Cooley v. Granville*, 10 id. 56; *Vincent v. Nantucket*, 12 id. 103; *Paine v. Spratley*, 5 Kan. 525; *Trustees, etc. v. McConnel*, 12 Ill. 140; *Caldwell v. Alton*, 33 Ill. 416; *De Russey v. Davis*, 13 La. Ann. 468; *Mays v. Cincinnati*, 1 Ohio St. 268; *Commissioners v. Mighels*, 7 id. 109; *Gallia Co. v. Holcomb*, 7 Ohio, 232; *State v. Mayor*, 5 Port. 279; *City Council v. Plank R. Co.*, 31 Ala. 76; *Burnet, Ex parte*, 30 id. 461; *Bangs v. Snow*, 1 Mass. 181; *Le Couteulx v. Buffalo*, 33 N. Y. 333; *Waxahachie v. Brown*, 67 Tex. 519; *Pittsburgh's Appeal*, 115 Pa. St. 4, 7 Atl. 778. Patents for inventions are not granted as monopolies or restrictions upon the rights of a community, but to promote science and the useful arts, and are to be liberally construed. *Blanchard v. Sprague*, 2 Story, 164, Fed. Cas. No. 1,518.

tion may extend to every onerous duty: to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, namely, that corporations can only exercise their powers over their respective members for the accomplishment of limited and defined objects. And if this principle is important as a general rule of social right and municipal law, it is of the highest importance in those states where corporations have been extended and multiplied so as to embrace almost every object of human concern.⁷⁸ The natural construction of a charter creating a corporation is that all the privileges conferred, all the duties declared, and all the burdens imposed, relate to it as a whole, and not to the individuals composing it. And although it may be enacted, it ought to be clearly done, before the corporators, as natural persons, can be affected.⁷⁹

§ 555 (382). It results from these principles that a corporation cannot be brought into existence except by a statute immediately creating it, or authorizing proceedings for its organization.⁸⁰ The charter serves a twofold purpose: It operates as a law conferring upon the corporation the right or franchise to act in a corporate capacity, and furthermore it contains the terms of the fundamental agreement between the corporators themselves.⁸¹ The powers of a corporation organized under statutes are such, and such only, as the statutes confer. Consistently with the rule applicable to all acts, that what is fairly implied is as much granted as what is expressed, it is true that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others.⁸² Such

⁷⁸ *Spaulding v. Lowell*, 23 Pick. 71.

⁷⁹ *State v. Bank of Newbern*, 1 Dev. & Bat. Eq. 219.

⁸⁰ 1 Morawetz on Corp., § 317.

⁸¹ 1 Morawetz on Corp., § 316.

⁸² *Thomas v. Railroad Co.*, 101

acts are strictly construed and all ambiguities are resolved against the corporation.⁸³ The same rule applies to the statute as to limited partnerships.⁸⁴

§ 556 (383). No particular form of words is necessary to create a corporation, but the intention to do so must be plainly indicated by the statute. If the purpose be left doubtful, the act will be construed against the claim of the parties setting it up.⁸⁵ The incorporation may result from necessary implication in the construction of a statute, as well as its purpose and powers. But, while express words of incorporation are not essential to create a corporation, and one may arise without such words out of the general language of a statute, if a corporation is necessary to accomplish the purpose of the act, still where no such necessity exists or such intention is otherwise implied a corporation

U. S. 71, 82, 25 L. Ed. 950; Richmond, etc. R. R. Co. v. Louisa R. R. Co., 13 How. 91, 14 L. Ed. 55; Dartmouth College v. Woodward, 4 Wheat. 518, 636, 4 L. Ed. 629; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Perrine v. Chesapeake, etc. Canal Co., 9 How. 172, 13 L. Ed. 92; Bank of United States v. Dandridge, 12 Wheat. 68, 6 L. Ed. 552; Steam Navigation Co. v. Dandridge, 8 Gill & J. 318; Rugles v. Illinois, 108 U. S. 526, 2 S. C. Rep. 832, 27 L. Ed. 812; Head v. Providence Ins. Co., 2 Cr. 127, 2 L. Ed. 229; Weckler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95; Brady v. Mayor, etc., 20 N. Y. 312; Tyng v. Commercial Warehouse Co., 58 id. 308; Straus v. Eagle Ins. Co., 5 Ohio St. 59; Overmyer v. Williams, 15 Ohio, 31; Vandall v. South T. F. Dock Co., 40 Cal. 83; Pullan v. Cincinnati, etc. R. R. Co., 4 Biss. 35, Fed. Cas. No. 11,461;

Matthews v. Skinker, 62 Mo. 329; State v. Krebs, 64 N. C. 604; New London v. Brainard, 22 Conn. 552; Brooklyn Gravel R. Co. v. Slaughter, 33 Ind. 185; Bellmeyer v. Independent Dist., etc., 44 Iowa, 564; Babcock v. New J. Stockyard Co., 20 N. J. Eq. 296; Ang. & A. on Corp., § 111.

⁸³ Louisville & N. R. R. Co. v. Commonwealth, 97 Ky. 675, 31 S. W. 476; State v. Lincoln Trust Co., 144 Mo. 562, 46 S. W. 593; Grey v. Newark Plank Road Co., 65 N. J. L. 51, 46 Atl. 606; Morrill v. Smith County, 89 Tex. 529, 36 S. W. 56; Louisville & N. R. R. Co. v. Kentucky, 161 U. S. 677, 16 S. C. Rep. 714, 40 L. Ed. 849; Louisville Trust Co. v. Cincinnati, 73 Fed. 716.

⁸⁴ Cummings v. Hayes, 100 Ill. App. 347.

⁸⁵ Penn. R. R. Co. v. Canal Com'rs, 21 Pa. St. 9. See 1 Waterm. on Corp., § 29.

will not be created by implication.⁸⁶ A general law providing the mode in which private corporations may be organized for business purposes will warrant the organization of a corporation for any purpose which is within the language and import of the statute, though such particular purpose be one that the legislature could not have foreseen — as where it is to utilize a subsequent invention. Thus, under a general act authorizing the formation of corporations for the purpose “of building and operating telegraph lines or conducting the business of telegraphing in any way,” telephone corporations may be organized and operate, because it is a mode of telegraphing.⁸⁷ In this case Cassoday, J., speaking for the court, said: “As for the difference in the mode of communication by means of a telegraphic and a telephonic apparatus, see *Attorney-General v. Edison Telephone Co. of London*.⁸⁸ In that case Mr. Stephen, one of the judges of the exchequer division of the high court of justice, who, unlike most American judges, seems to have sufficient time, not only to satisfy his own curiosity, but the curiosity of all the curious, has given a very lengthy and definitive discussion of that subject. In that case the court conclude that Edison’s telephone was a telegraph, within the meaning of the telegraph acts, although the telephone was not invented nor contemplated when those acts were passed. It is there said, in effect, that the mere fact, if it is a fact, that sound itself is transmitted by the telephone, establishes ‘no material distinction between telephonic and telegraphic communication, as the transmission, if it takes place, is performed by a wire acted on by electricity.’ It is there further said that, ‘of course, no one supposes that the legislature intended to refer specifically to telephones many years before they were invented, but it is highly

⁸⁶ *Walsh v. Trustees, etc.*, 96 N. Y. 427; *S. C.*, 6 Am. & Eng. Corp. Cas. 45; *Kreiger v. Shelby R. R. Co.*, 84 Ky. 66; *Newport Marsh Trustees, Ex parte*, 16 Sim. 346.

⁸⁷ *Wisconsin Telephone Co. v. Oshkosh*, 63 Wis. 32, 8 Am. & Eng. Corp. Cas. 538, 21 N. W. 828.

⁸⁸ *L. R.* 6 Q. B. Div. 244.

probable that they would, and it seems to us clear that they actually did, use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence.' It is upon this theory of progressive construction that the powers conferred upon congress to regulate commerce and to establish post-offices and post-roads have been held not confined to the instrumentalities of commerce or of the postal service known when the constitution was adopted, but keep pace with the progress and development of the country, and adapt themselves to the new discoveries and inventions which have been brought into requisition since the constitution was adopted, and hence include carriage by steamboats and railways, and the transmission of intelligence by telegraph."⁸⁹

§ 557 (385). When a corporation has been organized for a specific purpose it must pursue the mode prescribed for effecting that object and observe prohibitions; but otherwise it may proceed in the customary way, and in its business adopt the same methods to attain its legitimate objects, and deal in precisely the same way, as natural persons may who seek the accomplishment of the like ends.⁹⁰ Authority to incorporate does not include the right to take lands by devise.⁹¹ A statute which permitted corporations to be formed

⁸⁹ *Pensacola Telegraph Co. v. W. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708. See *State v. Cincinnati, etc. Co.*, 18 Ohio St. 262.

⁹⁰ *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 289; *Willmarth v. Crawford*, 10 Wend. 342; *Beers v. Phoenix Glass Co.*, 14 Barb. 358; *Partridge v. Badger*, 25 id. 146; *Richardson v. Mass. Charitable Ass'n*, 131 Mass. 174; *State v. Bank of Md.*, 6 Gill & J. 205, 26 Am. Dec. 561; *Clark v. Farrington*, 11 Wis. 306, 333; *Wendel v. State*, 62 id. 300, 304, 22 N. W. 435; *White W. Valley Canal Co. v. Vallette*, 21 How. 414, 424, 16 L. Ed. 154; *Union*

Bank v. Jacobs, 6 Humph. 515, 525; *Ohio Life Ins. etc. Co. v. Merchants' Ins. etc. Co.*, 11 id. 1, 22; *Mayor, etc. v. Second Ave. R. R. Co.*, 32 N. Y. 261; *State v. Washington Social L. Co.*, 11 Ohio, 96; *Webster v. People*, 98 Ill. 343; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Hayward v. Pilgrim Society*, 21 Pick. 270, 276; *Baird v. Bank of Washington*, 11 Serg. & R. 418; *Chester Glass Co. v. Dewey*, 16 Mass. 102; *Story on Bills*, 879; 2 *Kent's Com.* 239; 1 *Moraw. on Corp.*, § 320; *Ang. & A. on Corp.*, §§ 111, 145; 1 *Waterm. on Corp.*, § 147.

⁹¹ *Jackson v. Hammond*, 2 Cai.

for the growing, selling and purchasing of seeds, plants, trees, etc., for agricultural and ornamental purposes, was held not to authorize a corporation for the purpose of growing seeds as a food product, such as rice.⁹² An act which allowed incorporations for the purpose of trade or of carrying on any lawful mechanical, manufacturing or agricultural business was held to authorize a corporation to buy, own, lease, sell and improve real estate.⁹³ A statute granting powers and privileges to corporations will be held to refer only to domestic corporations, in the absence of plain indications to the contrary.⁹⁴ Power granted to an insurance company to receive in trust from any person money, jewels, plate or other valuable thing does not authorize it to conduct a banking business.⁹⁵ Authority to corporations to enter into any obligation or contract essential to the transaction of their business does not authorize them to form a partnership with individuals or to enter into any contract against public policy.⁹⁶ A statute requiring railroad companies to furnish proper facilities for the transportation of live stock does not authorize them to maintain stock yards so as to create a nuisance.⁹⁷ Authority to increase the capital stock of corporations to double the amount of its authorized capital means the capital originally authorized.⁹⁸

§ 558 (386). **Public grants in general.**—Public rights will not be treated as relinquished or conveyed away by inference or legal construction.⁹⁹ Statutes permitting the state to be sued are in derogation of its sovereignty and will

Cas. 337; *Corporation v. Scott*, 1 Cai. 544; *Jackson v. Cory*, 8 John. 385.

⁹² *Miller v. Tod*, 95 Tex. 404, 67 S. W. 483.

⁹³ *Finnegan v. Morenberg*, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552.

⁹⁴ *Matter of Estate of Prime*, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713.

⁹⁵ *Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045.

⁹⁶ *Sabine Tram Co. v. Bancroft*, 16 Tex. Civ. App. 170, 40 S. W. 837.

⁹⁷ *Anderson v. Chicago, etc. Ry. Co.*, 85 Minn. 337, 88 N. W. 1001.

⁹⁸ *Berg v. San Antonio St. Ry. Co.*, 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929.

⁹⁹ *Jersey City v. Hudson*, 13 N. J. Eq. 420; *Harrison v. Young*, 9 Ga. 359; *Bennett v. McWhorter*, 2 W. Va. 441; *People v. Lambier*, 5 Denio, 9; *Mayor, etc. v. Baltimore*,

be strictly construed.¹ Where a municipal corporation was granted the privilege "to use the ground or soil under any roads, railroad, highway, street line, alley or court within this state," for conduits to convey water, on condition of restoring the surface to the original condition, it was held that the placing of the pipes pursuant to this grant under a street did not preclude the city authorities from changing the grade of the street, and thereupon compelling the grantee to lower the pipes.² A public grant of land bordering on tide water will not, without express words, convey the seashore between high and low-water mark.³ And where an act extends a municipality over such waters, it will acquire no property in the soil within those limits.⁴ For many purposes connected with civil and criminal proceedings and judicial jurisdiction, the body of a county extends not only over the seashore, but to some distance below the ebb of the tide; and for like purposes, towns may be considered as having a co-extensive jurisdiction; but this has no bearing upon the question of property. An act of incorporation, therefore, without words of grant of the soil, would vest no part of the property of the government in such town. Nor was the purpose of the organization of such a nature as would require of the government any portion of the public right vested in it for the public use and benefit, and therefore no portion of the *jus publicum* will be presumed to have been granted without express words.⁵ A grant of a right to build a bridge does not confer a right to obstruct navigation.⁶ Nor, under a general power to a municipal corporation to lay out highways, can it lay out a highway over a navigable

etc. R. R. Co., 6 Gill, 288, 48 Am. Sage, 8 id. 221; Austin v. Carter, 1 Dec. 531. Mass. 230.

¹ Raymond v. State, 54 Miss. 562, 28 Am. Rep. 382. ⁴ Palmer v. Hicks, 6 John. 133.

² Jersey City v. Hudson, 13 N. J. Eq. 420. ⁵ Per Shaw, C. J., in Commonwealth v. Roxbury, 9 Gray, 494.

³ Commonwealth v. Roxbury, 9 Gray, 451; East Haven v. Hemingway, 7 Conn. 186; Middletown v. ⁶ Selman v. Wolfe, 27 Tex. 68.

See Inhabitants of Charlestown v. County Com'rs, 3 Met. 203.

river so that it may be obstructed by a bridge.⁷ A statute conferring privileges upon individuals should not be so construed as to work a public mischief. Accordingly where an act of the legislature authorized a proprietor of land lying on the East river—which is an arm of the sea—to construct wharves and bulkheads in the river in front of his land, and there was at that time a public highway through the land, terminating at the river, he had no right, by filling up the land between the shore and the bulkhead, to obstruct the public right of passage from the land to the water; but the street, by operation of law, extended from the former terminus over the newly-made land to the water.⁸

§ 559 (387). **Statutes for exercise of power of eminent domain.**—The right to take private property in any form, without the consent of the owner, is a high prerogative of sovereignty, which no individual or corporation can exercise without an express grant. The power may be delegated, but the delegation must plainly appear.⁹ It is accordingly held that statutes providing for such a taking

⁷ *Commonwealth v. Coombs*, 2 Mass. 489; *Arundel v. McCulloch*, 10 id. 70.

⁸ *People v. Lambier*, 5 Denio, 9. See *Galveston v. Menard*, 23 Tex. 349.

⁹ 1 Lewis, Em. Dom., § 240; *Creston Water Works Co. v. McGrath*, 89 Iowa, 502, 56 N. W. 680; *Sharp v. Spier*, 4 Hill, 76; *Adams v. Saratoga, etc. R. Co.*, 10 N. Y. 328; *Gilmer v. Lime Point*, 19 Cal. 47, 60; *Curran v. Shattuck*, 24 id. 427, 432; *Cavanagh v. Boston*, 139 Mass. 426, 1 N. E. 834, 52 Am. Rep. 716. In Maryland it is settled that the power to take private property for public use upon making just compensation may be exercised for the benefit of the public, by individuals or by corporations upon

whom the legislature has within proper limitations conferred the power so to exercise it. In construing statutes giving powers that are to be applied to great public objects, depending for its exercise upon the officers intrusted with their execution, and in whom it must of necessity vest large discretionary powers, the interpretation should be liberal. Care should be taken on the one hand to secure to the individual whose property is appropriated to the public a just and reasonable compensation, and, on the other, that the objects contemplated by the grant of powers shall not be defeated or embarrassed. *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479.

under the exercise of the power of eminent domain must be strictly construed.¹⁰ It is a taking in derogation of private rights. It is in hostility to the ordinary control of the citizen over his estate, and statutes authorizing condemnation are not to be extended by inference or implication.¹¹ But it is "a right existing at common law, although the manner in which it shall be exercised is prescribed by statute. Therefore it has been held that the same rigid rules ought not to be applied to statutory regulations for the exercise of a pre-existing common-law right as are sometimes applied to similar regulations for the exercise of a right created by statute, and in derogation of the common law."¹² Upon the application of a railroad company to appropriate lands by the exercise of the right of eminent domain, delegated to it, it is for the court to decide as to the necessity and extent of such appropriation, and the determination of the board of directors of the company is not conclusive upon that question.¹³ The acquisition of lands for speculation or sale, or to prevent interference by competing lines or methods, or in aid of collateral enterprises remotely connected

¹⁰ 1 Lewis, Em. Dom., § 254; *Matter of Water Com'rs of Amsterdam*, 96 N. Y. 351; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 315, 73 Am. Dec. 575; *Gilmer v. Lime Point*, 19 Cal. 47; *Curran v. Shattuck*, 24 Cal. 427; *Lance's Appeal*, 55 Pa. St. 16; *Beaty v. Knowler*, 4 Pet. 152, 7 L. Ed. 813; *Chicago, etc. R. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Chicago, etc. R. R. Co. v. Chicago*, 121 Ill. 176, 11 N. E. 907; *Illinois Cent. R. R. Co. v. Chicago, etc. R. R. Co.*, 122 Ill. 473, 13 N. E. 140; *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 10 S. E. Rep. 405; *Waterbury v. Platt*, 75 Conn. 387, 53 Atl. 958; *Hopkins v. Florida Central, etc. R. R. Co.*, 97 Ga. 107, 25 S. E. 452; *Oconee Elec. Light & P.*

Co. v. Carter, 111 Ga. 106, 36 S. E. 457; *Harvey v. Aurora & Geneva R. R. Co.*, 174 Ill. 295, 51 N. E. 163; *Illinois State Trust Co. v. St. Louis, etc. Ry. Co.*, 208 Ill. 419; *Goddard v. Chicago & N. W. Ry. Co.*, 104 Ill. App. 526; *Casey v. Burt County*, 59 Neb. 624, 81 N. W. 851; *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. 601; *Bly v. White Deer Mt. Water Co.*, 197 Pa. St. 80, 46 Atl. 929; *Woolard v. Nashville*, 108 Tenn. 353, 67 S. W. 801.

¹¹ *Rensselaer, etc. R. R. Co. v. Davis*, 43 N. Y. 137, 146.

¹² *Avery v. Groton*, 36 Conn. 304.

¹³ *Id.*; *Re St. Paul, etc. Ry. Co.*, 34 Minn. 227; *Tracy v. Elizabethtown, etc. R. R. Co.*, 80 Ky. 259.

with the running or operating of the road, although they may increase its revenues and business, are not such purposes as authorize the condemnation of private property.¹⁴ Where the public use for which condemnation is authorized contemplates an exclusive and perpetual possession, the condemnation and estimate of compensation must be equal thereto; they cannot be restricted to a less use or estate.¹⁵ In construing acts delegating the power to corporations two rules are universally recognized: first, that the company shall take that which the legislature empowers it to take, and in the state and condition prescribed by the legislature; and second, that all powers of this nature will be strictly construed — what is not expressly given is withheld. The company cannot carve out such an interest in, or incident of, property authorized to be taken as will suit its convenience and condemn that. It must take what the legislature authorizes it to take.¹⁶ Though it may not carve out a less estate than that authorized to be condemned, and condemn it, it may condemn a less estate which actually exists and is outstanding.¹⁷

§ 560 (388). There must be very clear expression of the legislative intent to authorize the taking, by the exercise of the power of eminent domain, of property which has already been devoted to a public use by an earlier exertion of the same power. Mr. Mills says: "To take property already appropriated to another public use, the act of the legislature must show the intent so to do by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting the intent."¹⁸ There is a broad-

¹⁴ *Id.* See *Spring Valley Water Works v. San Mateo W. Works*, 64 Cal. 123.

¹⁵ *Matter of Water Com'rs of Amsterdam*, 96 N. Y. 351.

¹⁶ *De Camp v. Hibernia R. R. Co.*, 47 N. J. L. 43, 50; *Hibernia R. R. Co. v. De Camp*, id. 518, 547, 4 Atl. 318, 54 Am. Rep. 197; *Jerome v. Ross*, 7 John. Ch. 315; *Lyon v.*

Jerome, 26 Wend. 485, 38 Am. Dec. 271; *Waterbury v. Platt*, 75 Conn. 387, 53 Atl. 958. See *Re Hartford, etc. R. R. Co.*, 65 How. Pr. 133.

¹⁷ *Hibernia R. R. Co. v. De Camp*, 68 N. Y. 167.

¹⁸ *Mills on Eminent Domain*, § 46. And see generally, 1 *Lewis, Em. Dom.*, §§ 266-276.

distinction between acts which subvert or essentially impair a prior franchise or appropriation to a public use and acts which permit a taking for a new public use, not involving an entire deprivation or diversion from the first use, but a joint use, so that after the second taking the same property serves still the original purpose as well as the new,—and the two uses are consistent. Under a general power to lay out and establish a railroad or highway, other railroads or highways may be crossed. In a case where a railroad company sought to condemn land previously appropriated by another railroad, used merely for a crossing, and it was contended that an express statute was required, the court say: "The right which is claimed is merely the privilege to cross the land and track of the plaintiffs. It is not proposed to make any use of their railroad, as such. Their franchises, therefore, are not interfered with." "Under these circumstances," says Beasley, C. J., speaking for the court, "I am wholly at a loss to perceive the force of the present objection. If the legislative grant of the power in question is sufficient to enable the defendants to run their new lines over the lands of individuals, why has it not an equal efficacy with regard to the land of the plaintiffs? Does an incorporated company stand, in this respect, on a higher level than the ordinary land-owner? I am not aware that such a prerogative has ever been claimed. If claimed, it ought not to be conceded. It may well be that, where the attempt is to sequester a portion of the franchises of a railroad company to the use of a company subsequently incorporated, such sequestration could not be justified, in the absence of a grant of such authority in clear and express terms. Such a right could scarcely be raised by implication. It certainly could not be inferred from a mere authority to acquire, by condemnation, the land requisite for the enterprise."¹⁹ This distinction is clearly recognized. One pub-

¹⁹ *Morris & Essex R. R. Co. v. Central R. R. Co.*, 31 N. J. L. 205, 213; *etc. R. R. Co.*, 23 Pick. 360; *Connect- ing Ry. Co. v. Union Ry. Co.*, 108 Ill. 265; *Chicago, etc. Ry. Co. v. Chi-*

lic use will not be permitted to be subverted or materially impaired by a subsequent grant, unless by express words or necessary implication.²⁰

§ 561 (389). An instance of a plain implication of an intent to invade a prior public use is where there is a grant to build a railroad between terminal points mentioned, and it cannot be reasonably be built without appropriating land already devoted to public use.²¹ In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent use. If both uses may not stand together, with some tolerable interference which may be compensated by damages paid; if the latter use, when exercised, must supersede the former, it is not to be implied

cago, etc. R. R. Co., 112 id. 589; Bradley v. New York, etc. R. R. Co., 21 Conn. 305; Starr v. Camden, etc. R. Co., 24 N. J. L. 592.

²⁰ State, National Ry. Co. pros. v. Easton, etc. R. R. Co., 36 N. J. L. 181; State, Mayor, etc. Jersey City, pros. v. Montclair Ry. Co., 35 id. 328; Springfield v. Conn. R. R. Co., 4 Cush. 63; Morris, etc. R. R. Co. v. Newark, 10 N. J. Eq. 352; New Jersey Southern R. R. Co. v. Long Branch Com'rs, 39 N. J. L. 28, 33; Matter of Boston, etc. R. R. Co., 53 N. Y. 574; Proprietors of Locks, etc. v. Lowell, 7 Gray, 223; Baltimore, etc. Turnpike Co. v. Union R. R. Co., 35 Md. 224, 231; Austin v. Carter, 1 Mass. 231; Oregon Ry. Co. v. Portland, 9 Ore. 231; Housatonic R. R. Co. v. Lee & H. R. R. Co., 118 Mass. 391; Arundel v. McCulloch, 10 Mass. 70; Worcester, etc. R. R. Co.

v. Railroad Com'rs, 118 id. 561, 567; Commonwealth v. Stevens, 10 Pick. 247; Commonwealth v. Coombs, 2 Mass. 489; West Boston Bridge v. County Com'rs, 10 Pick. 270; Milwaukee, etc. R. R. Co. v. Faribault, 23 Minn. 167; Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255; Central City Horse Ry. Co. v. Fort Clark Horse Ry. Co., 81 Ill. 523; Charlestown v. County Com'rs, 3 Met. 202; Wells v. County Com'rs, 79 Me. 522, 525; Kean v. Stetson, 5 Pick. 492; Marblehead v. County Com'rs, 5 Gray, 451; Illinois Cent. R. R. Co. v. Chicago, etc. R. R. Co., 123 Ill. 473, 13 N. E. 140; Matter of City of Buffalo, 68 N. Y. 167.

²¹ Providence, etc. R. R. v. Norwich, etc. R. R., 138 Mass. 277; Matter of the City of Buffalo, 68 N. Y. 167.

from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use, already in exercise, to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter, so that by reasonable intendment some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner.²²

§ 562 (390). *Statutes granting power.*—Statutes which impose burdens, or liabilities unknown at common law, are construed strictly in favor of those on whom such burdens are imposed, or in favor of those who are subjected to such liabilities. The principles governing construction of such legislation have been considered in the preceding pages. Power is generally given to some officer to do acts for the enforcement of such duties; then two principles concur to require strict construction; the second is that which applies to all statutory powers. They are construed strictly.²³ Where a statute provides that a certain person shall execute process, it can be executed by no other person.²⁴ “When a rule is laid down for the government of inferior jurisdictions, we are not at liberty to inquire whether it can safely be departed from; whether the mode pursued is equally beneficial to the party as that pointed out by the statute.

²² *Matter of the City of Buffalo*, 68 N. Y. 167.

²³ *Blackwell on Tax Titles*, 33-49; *County of Hardin v. McFarlan*, 82 Ill. 138; *Paine v. Spratley*, 5 Kan. 525; *People v. Supervisors*, 6 Hun, 304; *Wandsworth Board of Works v. United Telephone Co.*, L. R. 13

Q. B. Div. 904; *Rutherford v. Maynes*, 97 Pa. St. 78; *Hollenback v. Fleming*, 6 Hill, 303; *East Union Township v. Ryan*, 86 Pa. St. 459; *Indiana, etc. Ry. Co. v. Attica*, 56 Ind. 476; *Springfield v. Starke*, 93 Mo. App. 70.

²⁴ *Reynolds v. Orvis*, 7 Cow. 269.

The answer to arguments of this kind is that the law has prescribed the manner in which the person . . . may be apprehended."²⁵ Where any number of persons are appointed to act judicially in a public matter, they must all confer; but a majority may decide.²⁶ Power of sale under a mortgage was vested in two commissioners; it was held that it could not be exercised by one — discretion had to be used, and it could not be delegated.²⁷ In levying taxes or selling property for the non-payment thereof, the assessor and collector act under a special and limited authority, conferred by statute, and it must be strictly construed and closely followed.²⁸ The principle of strict construction as applied to such statutes is well illustrated by the case of *Sibley v. Smith*.²⁹ The court held that the principle that every grant of power carries with it the usual and necessary means for its exercise, and that the power to convey is implied in the authority to sell, cannot be admitted in the construction of statutes which are in derogation of the common law, and the effect of which is to divest the citizen of his real estate. Such statutes, although enacted for the public good, must be strictly construed. Their provisions can be enforced no further than they are clearly expressed.³⁰

²⁵ *Reynolds v. Orvis*, 7 Cow. 269.

²⁶ *Rogers, Ex parte*, 7 Cow. 526 and note; *Downer v. Rugar*, 21 Wend. 178; *State v. Bemis*, 45 Neb. 724, 64 N. W. 348; *In re State Treasurer's Settlement*, 51 Neb. 116, 70 N. W. 532, 36 L. R. A. 746; *Carolina Savings Bank v. Evans*, 28 S. C. 521, 6 S. E. 321.

²⁷ *Powell v. Tuttle*, 3 N. Y. 396.

²⁸ *Davis v. Farnes*, 26 Tex. 296; *Fisk v. Varnell*, 39 id. 73; *Hays v. Hunt*, 85 N. C. 303; *Sharp v. Speir*, 4 Hill, 76; *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 518; *Sharp v. Johnson*, 4 Hill, 92, 40 Am. Rep. 259; *Croxall v. Shererd*, 5 Wall. 268, 18 L. Ed. 572; *Jackson v. Catlin*, 2

John, 248, 3 Am. Dec. 415; *Commonwealth v. Roxbury*, 9 Gray, 451, 492-494; *Atkins v. Kinnan*, 20 Wend. 241, 32 Am. Dec. 534; *Young v. Martin*, 2 Yeates, 312; *Wills v. Auch*, 8 La. Ann. 19; *Jackson v. Shepard*, 7 Cow. 88; *Jackson, etc. R. R. Co. v. Davison*, 65 Mich. 416, 32 N. W. 726; *Brown v. Fowzer*, 114 Pa. St. 446, 6 Atl. 706; *Russel v. Transylvania University*, 1 Wheat. 432, 4 L. Ed. 129; *Pensacola v. Louisville, etc. R. R. Co.*, 21 Fla. 492; *Des Moines v. Gilchrist*, 67 Iowa, 210, 56 Am. Rep. 341.

²⁹ 2 Mich. 486.

³⁰ *Paine v. Spratley*, 5 Kan. 525; *Vanhorne's Lessee v. Dorrance*, 2

§ 563 (390). An act which authorizes a municipal body to open and widen streets according to the procedure therein prescribed, and omits to prescribe a procedure for cases of widening streets, is to that extent inoperative.³¹ A power to the freeholders to make prudential rules and regulations for improving their common lands and to impose penalties on offenders does not authorize them to prescribe a penalty against a stranger for trespass on such lands.³² Where a statute provides for a summary foreclosure by advertisement of mortgages containing a power of sale, the proceeding is special and statutory. The statute must be strictly pursued; and there are no presumptions or intendments in favor of the regularity of the proceedings.³³ It must at least be substantially complied with.³⁴ Every statutory requirement must be conformed to; but these sales are by contract, where the proceeding is authorized by the mortgagor himself to save expense and trouble of proceedings in equity. Therefore all provisions regulating such sales must be reasonably construed.³⁵ When the legislature grants power to a township to make donations to railroads and to issue bonds for the same, the grant is not invalid because it fails to provide means for determining the amount and terms of the donation, or the amount of the bonds to be issued, their terms and manner of execution. Such construction should be put on a statute granting a power as may best answer the intention which the makers had in view; and, if possible, it should be so construed that no clause, sentence or word shall be superfluous, void or insignificant.³⁶ As a general rule, where power is granted, it implies that any reasonable and proper means may be employed to execute it, unless

Dall. 304; *Doe v. Chuun*, 1 Blackf. 336; *Doughty v. Hope*, 1 N. Y. 79; *Powell v. Tuttle*, 3 N. Y. 396; *Striker v. Kelly*, 7 Hill, 9; S. C., 2 Denio, 323.

³¹ *Chaffee's Appeal*, 56 Mich. 244, 22 N. W. 871.

³² *Foster v. Rhoads*, 19 John. 191.

³³ *Niles v. Ransford*, 1 Mich. 338, 341, 51 Am. Rep. 95.

³⁴ *Grover v. Fox*, 36 Mich. 453, 466; *Sherwood v. Reade*, 7 Hill, 431; *Doyle v. Howard*, 16 Mich. 261.

³⁵ *Lee v. Clary*, 38 Mich. 223.

³⁶ *Niantic Savings Bank v. Douglas*, 5 Ill. App. 579.

specific directions are given.³⁷ An act conferring powers recited in a former act is to be construed as though the latter were a part of it.³⁸ A statute granting powers and referring to another statute for their definition only gives the general, and not the particular, powers conferred by the statute referred to.³⁹ Where specific regulations in a general law are adopted in a local act by words of general reference, subsequent changes therein are not necessarily adopted also, unless the intent to do so is clear.⁴⁰

§ 564 (391). Where special powers are conferred on a court either of otherwise general or limited jurisdiction it is rigorously restricted to those granted, and the grant itself is strictly construed;⁴¹ the jurisdictional facts must appear on the face of the proceedings.⁴² The court can take no additional power from its general jurisdiction. In the exercise of such special powers it is precisely limited to those plainly delegated. Nothing is to be presumed which is not expressly given.⁴³

§ 565 (392). A statutory remedy or proceeding is confined to the very case provided for and extends to no other.

³⁷ *Du Page County v. Jenks*, 65 Ill. 275.

³⁸ *Turney v. Wilton*, 36 Ill. 385.

³⁹ *Ex parte Greene*, 29 Ala. 52; *Matthews v. Sands*, id. 136.

⁴⁰ *Darmstaetter v. Moloney*, 45 Mich. 621, 8 N. W. 574.

⁴¹ *Matter of Beekman Street*, 20 John. 269; *Wight v. Wafner*, 1 Doug. (Mich.) 384; *Risewick v. Davis*, 19 Md. 82; *Given v. Simpson*, 5 Me. 303; *Morse v. Presby*, 25 N. H. 302; *Christie v. Unwin*, 3 Perry & Davison, 208; *Buck v. Dowley*, 16 Gray, 555; *State v. Woodson*, 41 Mo. 227.

⁴² *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221; *Kansas City, etc. R. R. Co. v. Campbell*, 62 Mo. 585; *Shivers v. Wilson*, 5 Har. & John.

130, 9 Am. Dec. 497; *Beach v. Botsford*, 1 Doug. (Mich.) 199, 40 Am. Dec. 45; *Clark v. Holmes*, 1 Doug. (Mich.) 390.

⁴³ *Geter v. Commissioners*, 1 Bay, 354, 1 Am. Dec. 621; *Russell v. Wheeler*, Hempst. 3; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221; *People v. Whitney's Point*, 102 N. Y. 81, 6 N. E. 895; *Earthman v. Jones*, 2 Yerg. 484; *Shivers v. Wilson*, 5 Har. & J. 130, 9 Am. Dec. 497; *Yerby v. Lackland*, 6 Har. & J. 446; *Gallatian v. Cunningham*, 8 Cow. 370; *Foot v. Stevens*, 17 Wend. 488; *Denning v. Corwin*, 11 Wend. 647; *Platt v. Stewart*, 10 Mich. 260, 265; *Stafford v. Mayor, etc.*, 7 John. 541.

It cannot be enlarged by construction;⁴⁴ nor be made available or valid except on the statutory conditions, that is, by strictly following the directions of the act.⁴⁵

§ 566 (393). A party seeking the benefit of such a statute must bring himself strictly not only within the spirit but its letter; he can take nothing by intendment.⁴⁶ An affidavit for an attachment which failed to state, as the statute required, that the attachment was not sued out for the purpose of injuring the defendant, was held fatally defective.⁴⁷ So where the amount claimed is required to be stated to be "due upon contract," the omission to state that the debt is due is fatal.⁴⁸ Hence if the affidavit is sworn to on a previous day, stating the sum due or existence of cause, like absence or concealment of defendant, the statute is not complied with.⁴⁹ The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed and cannot have force in cases not plainly within their terms.⁵⁰ An affidavit that the defendant in-

⁴⁴ Willard v. Fralick, 31 Mich. 431; Lombard v. Whiting, Walker (Miss.), 229; Keller v. Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; Dent v. Ross, 52 Miss. 188.

⁴⁵ Boyd v. Lowry, 53 Miss. 352; Scogins v. Perry, 46 Tex. 111; Robinson v. Schmidt, 48 id. 13; Bailey v. Bryan, 3 Jones' L. 357, 67 Am. Dec. 246; Walker v. Burt, 57 Ga. 20; Banks v. Darden, 18 id. 318; Monk v. Jenkins, 2 Hill's Ch. 13; Bloom v. Burdick, 1 Hill, 130, 37 Am. Dec. 299; Staples v. Fox, 45 Miss. 667; Risewick v. Davis, 19 Md. 82; Shivers v. Wilson, 5 Har. & J. 130, 9 Am. Dec. 497; Yerby v. Lackland, 6 Har. & J. 446; Ball v. Lastinger, 71 Ga. 678; Weller v. Weyand, 2 Grant's Cas. 103; Spence v. McGowan, 53 Tex. 30; Anness v. Providence, 13 R. I. 17; Dibrell v. Dandridge, 51 Miss. 55; Lombard

v. Whiting, Walk. (Miss.) 229; Connell v. Lewis, id. 251; Banks v. Cage, 1 How. (Miss.) 293.

⁴⁶ Ball v. Lastinger, 71 Ga. 678. See St. Paul, etc. Ry. Co. v. Phelps, 26 Fed. 569; Swann v. Jenkins, 82 Ala. 478.

⁴⁷ Burch v. Watts, 37 Tex. 135.

⁴⁸ Cross v. McMacken, 17 Mich. 511; Whitney v. Brunette, 15 Wis. 61; Hawes v. Clement, 64 id. 152, 25 N. W. 21; Streissguth v. Reigelman, 75 Wis. 212, 43 N. W. 1116.

⁴⁹ Drew v. Dequindre, 2 Doug. (Mich.) 93; Wilson v. Arnold, 5 Mich. 98; Fessenden v. Hill, 6 id. 242. Compare Graham v. Bradbury, 7 Mo. 281; Adams v. Lockwood, 30 Kan. 773, 2 Pac. 626; Foster v. Illinski, 3 Ill. App. 345.

⁵⁰ Van Norman v. Circuit Judge, 45 Mich. 204, 7 N. W. 796; Mathews v. Densmore, 43 Mich. 461, 5 N. W.

tends to abscond is not a compliance with the requirements of the provisions of a statute, commonly called the stay law, that there should be an affidavit that the defendant was about to abscond.⁵¹ A statute permitting a second suit in trespass to try title will be strictly construed.⁵² Enactments giving a remedy for judgment by motion against public officers or others, this being a summary proceeding in derogation of the common law, must be taken strictly.⁵³ Such acts have no latitude of construction.⁵⁴

§ 567 (394). Where the mode of taking a case to an appellate court is prescribed by statute the same rule is applied.⁵⁵ Statutes authorizing new methods of proof must be followed with strictness.⁵⁶ All exceptional methods of obtaining jurisdiction by courts over persons, natural or artificial, not found within the state, must be confined to the cases and be exercised in the precise way indicated by statute.⁵⁷ The jurisdiction and authority in such cases, like all jurisdiction and authority derived from and dependent upon statute, must be taken and accepted with all the limitations

669; *Morrison v. Fake*, 1 Pin. (Wis.) 133; *Whitney v. Brunette*, 15 Wis. 61. But see *Cole v. Aune*, 40 Minn. 80, 41 N. W. 934.

⁵¹ *Guillaume v. Miller*, 14 Rich. 118. See *Myers v. Farrell*, 47 Miss. 281.

⁵² *Spence v. McGowan*, 53 Tex. 80.

⁵³ *Hearn v. Ewin*, 3 Cold. 399; *Willard v. Fralick*, 31 Mich. 431; *Robinson v. Schmidt*, 48 Tex. 13; *Bailey v. Bryan*, 3 Jones' L. 357; *Banks v. Darden*, 18 Ga. 318; *Scogins v. Perry*, 46 Tex. 111.

⁵⁴ *Rice v. Kirkman*, 3 Humph. 415.

⁵⁵ *Kramer v. Holster*, 55 Miss. 243; *Ricard v. Smith*, 37 id. 644. See *Bank of Monroe v. Widner*, 11 Paige, 529; *Humphrey v. Chamberlain*, 11 N. Y. 274.

⁵⁶ *Dyson v. West*, 1 Har. & J. 567; *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97; *Buford v. Bostick*, 58 Tex. 63; *Dequasei v. Harris*, 16 W. Va. 345.

⁵⁷ *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 441; *Jordan v. Giblin*, 12 Cal. 100; *Ricketson v. Richardson*, 26 id. 149; *McMinn v. Whelan*, 27 id. 300; *Gray v. Larrimore*, 2 Abb. (U. S.) 542, Fed. Cas. No. 5721; *Sayre v. Elyton Land Co.*, 73 Ala. 85, 98, 99; *Brown v. Tucker*, 7 Colo. 30; S. C., 1 West Coast Rep. 489; *Pollard v. Wegener*, 13 Wis. 569; *Stewart v. Stringer*, 41 Mo. 400; *Scorpion S. M. Co. v. Marsano*, 10 Nev. 370; *Fontaine v. Houston*, 58 Ind. 316; *Bradley v. Jamison*, 46 Iowa, 68.

and restrictions the act creating it may impose. These restrictions and limitations the courts are bound to observe; they cannot be dispensed with, however much they may appear to embarrass or however unnecessary they may seem to be in the administration of justice in particular cases. The statute is in derogation of the common law, is an essential departure from the form and modes a court ordinarily pursues, and must be strictly construed.⁵⁸

§ 568 (395). **Jurisdiction of courts.**—Jurisdiction cannot be created or taken away by implication, except where the implication is necessary from the language and purpose of the statute.⁵⁹ As in the usual distribution of fundamental powers of the government to separate departments—legislative, executive and judicial—the grant to each is exclusive,⁶⁰ so in the distribution of the judicial power of the state to certain named courts the grant is exclusive as to the courts mentioned⁶¹ and as to the powers apportioned to each.⁶² Where common-law and chancery jurisdiction is conferred on certain courts, and provision is made in the same act for a probate court, the latter will not receive that jurisdiction, but only such as is implied in its name according to the antecedent and contemporary judicial history of the subjects cognizable by the courts under that and similar designations.⁶³

⁵⁸ Sayre v. Elyton Land Co., 73 Ala. 85.

⁵⁹ Keitler v. State, 4 Greene (Iowa), 291; School Inspectors v. People, 20 Ill. 525; Pringle v. Carter, 1 Hill (S. C.), 53; Thompson v. Cox, 8 Jones L. (N. C.), 311; Ryan v. Commonwealth, 80 Va. 385; Beebe v. Scheidt, 13 Ohio St. 406. See Caulfield v. Stevens, 28 Cal. 118; Mecham v. McKay, 37 Cal. 154.

⁶⁰ Cooley, Const. Lim. 106, 107; Sill v. Village of Corning, 15 N. Y. 297; Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377; People v. Draper, 15 N. Y. 532, 543, 544.

⁶¹ Greenough v. Greenough, 11 Pa. St. 489, 51 Am. Dec. 567; State v. Maynard, 14 Ill. 419; Smith v. Odell, 1 Pin. (Wis.) 449; Chandler v. Nash, 5 Mich. 409; Gough v. Dorsey, 27 Wis. 119; Alexander v. Bennett, 60 N. Y. 204; Hughes v. Felton, 11 Colo. 489. See Home Ins. Co. v. Northwestern Packet Co., 32 Iowa, 223.

⁶² Van Slyke v. Trempealeau, etc., Ins. Co., 39 Wis. 390; Byrd v. Brown, 5 Ark. 709; Gough v. Dorsey, 27 Wis. 119; Given v. Simpson, 5 Me. 303. See People v. Daniell, 50 N. Y. 274.

⁶³ Ferris v. Higley, 20 Wall. 375,

§ 569 (396). When jurisdiction is once granted it will not be deemed taken away by a similar jurisdiction being given to another tribunal.⁶⁴ In *Commonwealth v. Hudson*⁶⁵ the question was whether a grant of a certain jurisdiction to justices of the peace affected that previously existing in the court of common pleas over the same subject. Shaw, C. J., said: "Before this statute the court of common pleas had jurisdiction over this subject-matter. Is that jurisdiction taken away? It is no answer to say that another tribunal has jurisdiction; for that is very common. It is in such case concurrent jurisdiction, whether so called in the statute or not. . . . There must be words of limitation, to take it away, either by using the word 'exclusive,' or by repealing the former act giving jurisdiction, by which it may appear that the legislature meant, not only to confer jurisdiction on justices of the peace, but to take away the other jurisdiction."⁶⁶ Only express words, or what is equivalent, can take away the jurisdiction of the superior courts.⁶⁷ This

22 L. Ed. 383; *Robinson v. Fair*, 128 U. S. 53, 9 S. C. Rep. 30, 32 L. Ed. 415; *Zander v. Coe*, 5 Cal. 230; *Appeal of Houghton*, 42 id. 35; *Matter of Will of Bowen*, 34 id. 682, 689; *Rosenberg v. Frank*, 58 id. 387, 402.

⁶⁴ *Duncombe v. Felt*, 81 Mich. 332, 45 N. W. 1004; *Brandon v. Carter*, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673; *Matter of Steinway*, 31 App. Div. 70, 52 N. Y. S. 343; *State v. Martin*, 68 Vt. 93, 34 Atl. 40.

⁶⁵ 11 Gray, 64.

⁶⁶ *Tackett v. Volger*, 85 Mo. 480; *Dick's Appeal*, 106 Pa. St. 589; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. Rep. 737; *Barnawell v. Threadgill*, 5 Ired. Eq. 86; *Berkowitz v. Lester*, 121 Ill. 99, 11 N. E. 860; *Taylor v. Williams*, 78 Va. 423;

Hurth v. Bower, 30 Hun, 151; *Jenkins v. Crevier*, 50 N. J. L. 351, 13 Atl. 28; *In re Creighton*, 12 Neb. 280; *Catlin v. Wheeler*, 49 Wis. 507, 5 N. W. 935.

⁶⁷ *Rex v. Abbot*, 2 Doug. 553, note; *Cates v. Knight*, 3 T. R. 442; *Shipman v. Henbest*, 4 id. 109; *Albon v. Pyke*, 4 M. & Gr. 424; *Balfour v. Malcolm*, 8 Cl. & Fin. 500; *Jacobs v. Brett*, L. R. 20 Eq. 6; *Rex v. Mayor of London*, 9 B. & C. at p. 27; *In re Twenty-eighth St.*, 102 Pa. St. 140; *Crisp v. Bunbury*, 8 Bing. 394; *Reeves v. White*, 17 Q. B. 995; *Richards v. Dyke*, 3 Q. B. 256; *Timms v. Williams*, id. 413; *State v. Drowne*, 20 R. I. 302, 38 Atl. 978; *Rosencrans v. United States*, 165 U. S. 257, 17 S. C. Rep. 302, 41 L. Ed. 708.

principle applies not only to a court's original, but to its appellate, jurisdiction, and its customary modes of exercising them. Statutes which deprive a court of jurisdiction are strictly construed,⁶⁸ while those which extend its jurisdiction are liberally construed.⁶⁹ In *Hartley v. Hooker*⁷⁰ Lord Mansfield said: "If a new offense is created by statute, and a special jurisdiction out of the course of the common law is prescribed, it must be followed. If not strictly pursued, all is a nullity, and *coram non judice*; and objections may be taken in any stage of the cause. In such case there is no occasion to oust the common-law courts, because not being an offense at common law, and punishable only *sub modo*, in the particular manner prescribed, they never could have jurisdiction. But where a new offense is created, and directed to be tried by an inferior court, established according to the course of the common law, such inferior court tries the offense as a common-law court, subject to be removed by writs of error, *habeas corpus*, *certiorari*, and to all the consequences of common-law proceedings. In that case this court cannot be ousted of its jurisdiction without express negative words." It may change the venue.⁷¹ It may summon or complete a jury when the statutory process fails.⁷² § 570 (397). The jurisdiction granted by the constitution cannot be abridged or infringed by the legislature, territorially⁷³ nor as to subject-matter.⁷⁴ If it is defined in that in-

⁶⁸ *State v. Sullivan*, 110 N. C. 513, 14 S. E. 796; *United States v. Am. Bell Tel. Co.*, 159 U. S. 548, 16 S. C. Rep. 69, 40 L. Ed. 255.

⁶⁹ *Simmons v. Leonard*, 89 Tenn. 622, 15 S. W. 444; *Kansas City v. Summerwell*, 58 Mo. App. 246. But a statute extending the jurisdiction of the court of claims and thereby enlarging the right to sue the government is strictly construed. *Blackfeather v. United States*, 190 U. S. 368.

⁷⁰ 2 Cowp. 523.

⁷¹ *Wilberf. on St. 44*; *Southampton Bridge Co. v. Local Board of Southampton*, 8 E. & B. at p. 804.

⁷² *Clawson v. United States*, 114 U. S. 477, 5 S. C. Rep. 949, 29 L. Ed. 179.

⁷³ *Dillard v. Noel*, 2 Ark. 449; *Commonwealth v. Commissioners*, etc., 37 Pa. St. 237; *Meyer v. Kalkmann*, 6 Cal. 582; *Landers v. Staten Island R. R. Co.*, 14 Abb. Pr. (N. S.) 346; *Connors v. Gorey*, 32 Wis. 518.

⁷⁴ *Hicks v. Bell*, 3 Cal. 219; *Parsons v. Tuolumne Co. W. Co.*, 5 id.

strument the legislature can neither add to nor diminish it; neither can it invest a court whose original jurisdiction is therein defined with additional jurisdiction of that nature, nor deprive it of any part of its appellate jurisdiction so conferred.⁷⁵ The essential qualities of a constitutional court are indestructible and unalterable by the legislature,⁷⁶ though it may regulate the manner in which it shall be put in action;⁷⁷ as by prescribing when appellate jurisdiction shall be exercised on appeal and when on writ of error.⁷⁸ When exclusive, revising or appellate jurisdiction is given by the constitution to the supreme court of a state, a statute cannot authorize a trial court to revise its own judgments at a term subsequent to that at which they were rendered.⁷⁹ In other words, the legislature cannot give appellate jurisdiction to any other court.⁸⁰

§ 571 (398). **Statutory rights.**—Such rights depend on the statutes creating them, and these are construed strictly.⁸¹ This principle is illustrated by the cases brought to enforce

43; *State v. Mace*, 5 Md. 337; *Chandler v. Nash*, 5 Mich. 409; *Waldby v. Callendar*, 8 id. 430; *State v. Northern, etc. Ry. Co.*, 18 Md. 193; *Jones v. Smith*, 14 Mich. 334; *Callanan v. Judd*, 23 Wis. 343; *Heath v. Kent Circuit Judge*, 37 Mich. 372; *Averill v. Perrott*, 74 Mich. 296, 41 N. W. 929. See *State v. Jones*, 22 Ark. 331. Where an act gave exclusive jurisdiction of all misdemeanors to the county court of Knox county, it was held not to repeal an existing statutory provision authorizing the circuit court to punish when the defendant was acquitted of a felonious charge and convicted of a misdemeanor. *Carter v. State*, 6 Cold. 537.

⁷⁵ *Vail v. Dinning*, 44 Mo. 210.

⁷⁶ *Harris v. Vanderveer*, 21 N. J. Eq. 424.

⁷⁷ *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966. See *Ex parte Candee*, 48 Ala. 386.

⁷⁸ *Haight v. Gay*, 8 Cal. 297, 68 Am. Dec. 323.

⁷⁹ *Byrd v. Brown*, 5 Ark. 709.

⁸⁰ *Caulfield v. Hudson*, 3 Cal. 389; *People v. Peralta*, id. 379; *Deck v. Gherke*, 6 id. 666.

⁸¹ *Pell v. Ulmar*, 18 N. Y. 139; *Van Valkenburgh v. Torrey*, 7 Cow. 252; *Hollister v. Hollister Bank*, 2 Keyes, 245; *Beecher v. Baldy*, 7 Mich. 488; *Dyson v. Sheley*, 11 id. 527; *Walker v. Chicago*, 56 Ill. 277; *Itawamba v. Candler*, 63 Miss. 193; *Hill v. Coats*, 109 Ill. App. 266; *General Fire Extinguisher Co. v. Chaplin*, 183 Mass. 375, 67 N. E. 321; *Holt v. Hannibal & St. J. R. R. Co.*, 174 Mo. 524, 74 S. W. 631.

the statutory right in favor of the widow or next kin to recover damages resulting from the death of a person caused by negligence.⁸² Statutes made for the accommodation of particular citizens or corporations ought not to be construed to affect the rights or privileges of others unless such construction results from express words or from necessary implication. But every part of a statute must have a reasonable effect.⁸³ Statutes authorizing persons to prosecute *in forma pauperis* should be construed strictly as against the applicant.⁸⁴ A statute gave a right to detain trespassing animals until seventy-five cents per day should be paid for their keeping, when they had trespassed upon the inclosure of a party by breaking through a lawful fence; this right being statutory was held *stricti juris*; the injured party could avail himself of it only on the precise statutory condition that the animals had broken through such a fence.⁸⁵ An act authorizing gratuitous credits to be made on a debt owing to the state must be restricted to its obvious and plain intent and be construed most favorably, in case of doubt, for the government.⁸⁶ The mechanics' lien law confers special privileges and rights upon one class of people not enjoyed by others; therefore courts in construing such statutes confine them to their express letter, and require that the case shall be brought clearly within them before relief will be granted. Such laws are not extended by liberal construction to embrace cases not within their language.⁸⁷ A statute which gives a judgment creditor a right

⁸² *Ante*, § 547.

⁸³ *Coolidge v. Williams*, 4 Mass. 140, 145; *Rothgerber v. Dupuy*, 64 Ill. 452; *Scaggs v. Baltimore*, etc. R. R. Co., 10 Md. 268.

⁸⁴ *Moore v. Cooley*, 2 Hill, 412.

⁸⁵ *Dent v. Ross*, 52 Miss. 188.

⁸⁶ *Green's Estate*, 4 Md. Ch. 349.

⁸⁷ *Roberts v. Fowler*, 3 E. D. Smith, 632; *Rothgerber v. Dupuy*, 64 Ill. 452; *Chapin v. Persse &*

Brooks Paper Works; 30 Conn. 461, 474; *Womelsdorf v. Heifner*, 104 Pa. St. 1; *Scaife v. Stovall*, 67 Ala. 287; *Wagar v. Briscoe*, 38 Mich. 537. Statutes which give a lien for services upon logs and timber are construed liberally in the interest of labor. *Jacubeck v. Hewitt*, 61 Wis. 96, 20 N. W. 372; *Kollock v. Parcher*, 25 Wis. 372; *Hogan v. Cushing*, 49 id. 169, 5 N. W. 490. See, as to

to have a sheriff who is delinquent in returning an execution amerced for his use, on motion, in the amount of the debt, damage and costs, must be strictly construed. He who would avail himself of such a summary remedy must bring himself within both the letter and spirit of the law.⁸⁸ And where such a statute provides that if he is thus required to pay a judgment it shall vest in him and execution may issue for his use, he must bring himself strictly within the terms of the act by payment of the judgment.⁸⁹ A statute authorizing the destruction of property to prevent the spread of fire provided a remedy for compensation to the owner. It was held that the remedy could only be asserted in the manner defined therein.⁹⁰ So where a remedy is given in the charter of a company to the land-owner for getting compensation for land taken for the use of the corporation under its charter, he must pursue this remedy, as that given thereby is exclusive of all others.⁹¹

§ 572 (399). When a right is given by statute and a specific remedy provided, or a new power and also the means of executing it are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by the act.⁹² This rule does not conflict with the general rule that the jurisdiction of a court is not impaired

the rule of construction applied to statutes giving a remedy for enforcing mechanics' liens, *Rude v. Mitchell*, 97 Mo. 365, 11 S. W. 225, criticised in 24 Am. L. Rev. 857; *Thomas v. Huesman*, 10 Ohio St. 152; *Keemer v. Herr*, 98 Pa. St. 6; *Manly v. Downing*, 15 Neb. 637, 19 N. W. 601; *Johnson v. Stout*, 42 Minn. 514, 44 N. W. 534.

⁸⁸ *Moore v. McClief*, 16 Ohio St. 51, 54; *Duncan v. Drakeley*, 10 Ohio, 47; *Bank of Gallipolis v. Domigan*, 12 Ohio, 220, 40 Am. Dec. 475; *Webb v. Anspach*, 3 Ohio St. 522; *Conkling v. Parker*, 10 id. 28; *Langdon*

v. Summers, id. 79; *Dibrell v. Dandridge*, 51 Miss. 55.

⁸⁹ *Staple v. Fox*, 45 Miss. 667.

⁹⁰ *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613.

⁹¹ *Railroad v. McKaskill*, 94 N. C. 746; *McIntire v. Western N. C. R. Co.*, 67 N. C. 278; *Johnston v. Rankin*, 70 N. C. 550.

⁹² *Sedgw. on Stat. & Const. Law*, 343; *Janney v. Buell*, 55 Ala. 408; *Phillips v. Ash*, 63 id. 414; *Chandler v. Hanna*, 73 id. 390; *Dudley v. Mayhew*, 3 N. Y. 9; *Hollister v. Hollister Bank*, 2 Keyes, 245.

by statutes conferring upon other tribunals jurisdiction of the same kind and to reach the same redress, unless the statute expressly takes away the former jurisdiction;⁹³ nor with the other well-settled rule, that if the statute gives a remedy in the affirmative without a negative, express or implied, for a matter which was actionable at common law, the party may sue at the common law as well as upon the statute; for this does not take away the common-law remedy.⁹⁴ In the cases to which these rules are applied the right existed, and its enforcement lay within the appropriate existing jurisdiction. Statutes affirmative of the right, and prescribing other than the usual remedies for its enforcement, or conferring cognizance of it upon other tribunals, not negating the pre-existing remedies or jurisdiction, in their very nature are merely cumulative, and not exclusive. But when a right is solely and exclusively of legislative creation, when it does not derive existence from the common law or from the principles of equity, jurisdiction may be limited to particular tribunals, and new specific remedies provided for its enforcement. Then the jurisdiction can be exercised and the remedy pursued only as the statute provides.⁹⁵ Where a statute gives a new remedy for a right existing and enforceable either at common law or in equity, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two.⁹⁶ If a new right is created by statute and it is silent as to the mode of its en-

⁹³ *Id.*; *Gittings v. Crawford*, Taney's Dec. 1, Fed. Cas. No. 5465.

⁹⁴ *Almy v. Harris*, 5 John. 175; *Sedgw. on Stat. & Const. L.* 342.

⁹⁵ *Chandler v. Hanna*, 73 Ala. 390; *Dudley v. Mayhew*, 3 N. Y. 9; *Dickinson v. Van Wormer*, 39 Mich. 141; *Matter of Opening House Ave.*, 67 Barb. 350.

⁹⁶ *Branch Bank v. Tillman*, 13 Ala. 214; *Greenville, etc. R. R. Co. v. Cathcart*, 4 Rich. 89; *Stafford v.*

Ingersol, 3 Hill, 38; *Clark v. Brown*, 18 Wend. 213; *Colden v. Eldred*, 15 John. 220; *Scidmore v. Smith*, 13 id. 322; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Troy, etc. R. R. Co. v. Tibbits*, 18 Barb. 297; *Renwick v. Morris*, 3 Hill, 621; *S. C.*, 7 id. 575; *Smith v. Drew*, 5 Mass. 514; *Waldo v. Bell*, 13 La. Ann. 329; *Mitchell v. Duncan*, 7 Fla. 13; *Booker v. McRoberts*, 1 Call, 243.

forcement, or as to the form of redress in case of invasion, then the proprietor of that right may resort to the common law or the existing general statutory procedure for remedial process.⁹⁷ In the absence of statutory regulations of procedure courts will exercise their powers according to the general practice.⁹⁸ When a statute refers generally to powers to enforce obedience, and does not prescribe procedure, the powers generally referred to would be those of the court in which the proceedings are pending.⁹⁹

§ 573 (400). **Statutes in derogation of the common law.** Such statutes as take away a common-law right, remove or add to common-law disabilities, confer privileges or provide for proceedings unknown to the common law, or which are in derogation of the common law, are strictly construed.¹

⁹⁷ *Ewer v. Jones*, 2 Salk. 415; *Beckford v. Hood*, 7 T. R. 620; *Donaldson v. Beckett*, 2 Bro. P. C. 129; *Dudley v. Mayhew*, 3 N. Y. 9; *Jacob v. United States*, 1 Brock. 520; *Branch Bank v. Tillman*, 13 Ala. 214; *Lynes v. State*, 5 Port. 236; *United States v. Wyngall*, 5 Hill, 16; *Constantine v. Van Winkle*, 6 id. 177; *Leland v. Tousey*, id. 328; *Burnham v. Onderdonk*, 41 N. Y. 425; *Alma v. Harris*, 5 John. 175; *Chisholm v. Northern Transportation Co.*, 61 Barb. 363; *Russell v. Irby*, 13 Ala. 131.

⁹⁸ *Lynes v. State*, 5 Port. 236.

⁹⁹ *Green v. Lord Penzance*, L. R. 6 App. Cas. 675.

¹ *Kohn v. Collison*, 1 Marvel (Del.), 109, 27 Atl. 834; *Kellogg Newspaper Co. v. Peterson*, 162 Ill. 158, 44 N. E. 411, 53 Am. St. Rep. 300; *Griffen v. Henry*, 99 Ill. App. 284; *Thornburg v. Am. Strawboard Co.*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334; *Bresser v. Saarman*, 112 Iowa, 720, 84 N. W. 920; *Sutton v. Sutton*,

87 Ky. 216, 8 S. W. 337, 12 Am. St. Rep. 476; *Sanford v. Marsh*, 180 Mass. 210, 62 N. E. 268; *Singer Mfg. Co. v. Cullaton*, 90 Mich. 639, 51 N. W. 687; *St. Louis River Dalles Imp. Co. v. Nelson Lumber Co.*, 51 Minn. 10, 52 N. W. 976; *Cox v. Kyle*, 75 Miss. 667, 23 So. 518; *Judson v. Smith*, 104 Mo. 61, 75, 15 S. W. 956; *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13; *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; *Sarazin v. Union R. R. Co.*, 153 Mo. 479, 55 S. W. 92; *Palmer v. McMaster*, 8 Mont. 186, 192, 19 Pac. 585; *Westheimer v. Goodkind*, 24 Mont. 90, 60 Pac. 813; *Minor v. Marshall*, 6 N. M. 194, 27 Pac. 481; *Fitzgerald v. Quann*, 109 N. Y. 441, 17 N. E. 354; *Dean v. Metropolitan El. R. R. Co.*, 119 N. Y. 540, 23 N. E. 1054; *Stamford v. Fisher*, 140 N. Y. 187, 35 N. E. 500; *McMahon v. Hodge*, 2 Misc. 234, 21 N. Y. S. 971; *Boyd v. Redd*, 120 N. C. 335, 27 S. E. 35, 58 Am. St. Rep. 92; *Johnston v. Barrills*, 27 Ore. 251, 41 Pac. 656,

The courts cannot properly give force to them beyond what is expressed by their words, or is necessarily implied from what is expressed.² There should doubtless be the same strictness of construction of a statute in derogation of an

50 Am. St. Rep. 717; *Bank of Columbia v. Portland*, 41 Ore. 1, 67 Pac. 1112; *Hand v. Cole*, 88 Tenn. 400, 12 S. W. 922; *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634, 32 S. W. 1097, 49 Am. St. Rep. 943, 31 L. R. A. 593; *Erkman v. Carnes*, 101 Tenn. 136, 45 S. W. 1067; *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409; *Cope v. Cope*, 137 U. S. 682, 11 S. C. Rep. 222, 34 L. Ed. 832; *Fidelity Ins., Trust & Safe Dep. Co. v. Norfolk & W. R. R. Co.*, 90 Fed. 175. Referring to the rule in question, the court, in *Roselle v. Harmon*, 103 Mo. 389, 15 S. W. 432, 12 L. R. A. 187, says: "That rule of construction is not of universal application. It depends much on the character of the law to be affected. In case of statutes, penal in their character, or in derogation of common right, a strict construction is required, but, in regard to statutes merely remedial in their character, a fair, if not liberal, construction should be given." p. 343. In some states the rule is abolished by statute. *Darby v. Heagerty*, 2 Idaho, 282, 13 Pac. 85; *Sutton v. Sutton*, 87 Ky. 216, 8 S. W. 337, 12 Am. St. Rep. 476.

²*Smith v. Argall*, 6 Hill, 479; *Burnham v. Sumner*, 50 Miss. 517; *Hopkins v. Sandidge*, 31 id. 668; *Doughty v. Hope*, 3 Denio, 594; *McMechen v. McMechen*, 17 W. Va. 683; *Monson v. Chester*, 22 Pick. 385; *Scott v. Simons*, 70 Ala. 352; *Fisher v. Bidwell*, 27 Conn. 363;

Matter of Fitzgerald, 2 Cai. 318; *Dewey v. Goodenough*, 56 Barb. 54; *Baum v. Mullen*, 47 N. Y. 577; *McManus v. Gavin*, 77 id. 36; *People v. Hadden*, 3 Denio, 220; *Thompson v. Weller*, 85 Ill. 197; *Corwin v. Merritt*, 3 Barb. 341; *Edwards v. Gaulding*, 38 Miss. 118; *People v. Hulse*, 3 Hill, 309; *Tuttle v. Walton*, 1 Ga. 51. A statute of Alabama provides: "A seal is not necessary to convey the legal title to land to enable the grantee to sue at law. And any instrument in writing signed by the grantor, or his agent having written authority, is effectual to transfer the legal title to the grantee, if such was the intention of the grantor to be collected from the entire instrument." In *Webb v. Mullins*, 78 Ala. 111, it was decided that this statute is remedial and to be liberally construed, "so far as may necessary to suppress the mischief, and effectuate the purpose and intent of the law-maker; but being in modification of the common law it will not be presumed to modify it farther than is expressly declared; and construction or intendment will not be resorted to for the purpose of extending its operation." It was accordingly held that an instrument of writing in the form of a deed under seal, signed, attested and acknowledged, but containing no words of grant or transfer, could not operate as a conveyance, though a regular *habendum* clause was in-

enforceable equity.³ The following have been held to fall within the rule: Statutes for the adoption of children,⁴ relating to the execution and effect of chattel mortgages,⁵ giving action for death of child,⁶ providing for a sale of land held in common and division of the proceeds of sale,⁷ giving a bank a lien on the stock of a stockholder indebted to it,⁸ providing for inheritance by or from illegitimate children,⁹ that indorsement and delivery of a bill of lading shall pass title to the property represented by it,¹⁰ providing for constructive service,¹¹ and statutes providing for summary or special proceedings.¹² Statutes changing the common law are strictly construed, and it is not further abrogated than the language of the statute clearly and necessarily requires.¹³

sented — "to have and to hold to the said J. M. B., his heirs and assigns forever." A statute legitimating bastards should be liberally construed. *Beall v. Beall*, 8 Ga. 210.

³ *Baker v. Terrell*, 8 Minn. 195.

⁴ *Bresser v. Saarman*, 112 Iowa, 720, 84 N. W. 920; *Sarasin v. Union R. R. Co.*, 153 Mo. 479, 55 S. W. 92.

⁵ *Griffen v. Henry*, 99 Ill. App. 284.

⁶ *Thornburg v. Am. Strawboard Co.*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334.

⁷ *Cox v. Kyle*, 75 Miss. 667, 23 So. 518.

⁸ *Boyd v. Redd*, 120 N. C. 335, 27 S. E. 35, 58 Am. St. Rep. 592.

⁹ *Sanford v. Marsh*, 180 Mass. 210, 62 N. E. 268; *Cope v. Cope*, 137 U. S. 682, 11 S. C. Rep. 222, 34 L. Ed. 832.

¹⁰ *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

¹¹ *Palmer v. McMaster*, 8 Mont. 186, 192, 19 Pac. 585; *Ware v. Easton*, 46 Minn. 180, 48 N. W. 175.

¹² *Judson v. Smith*, 104 Mo. 61, 75, 15 S. W. 956; *Johnston v. Barrills*,

27 Ore. 251, 41 Pac. 656, 50 Am. St. Rep. 717; *Bank of Columbia v. Portland*, 41 Ore. 1, 67 Pac. 1112; *Erkman v. Carnes*, 101 Tenn. 136, 45 S. W. 1067. In next to the last case cited the court says: "Proceedings in derogation of the common law, by which individuals and citizens may be divested of title to property, must be conducted in substantial if not strict compliance with the requirements of the statute, and every requisite designed for their protection and benefit must be observed in all its essential parts."

¹³ *Murphy v. Preston*, 5 Mackey, 514; *McRoberts v. Lyon*, 79 Mich. 25, 44 N. W. 160; *Forrester v. Boston*, etc. Min. Co., 21 Mont. 544, 55 Pac. 229, 353; *People v. Palmer*, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423; *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847; *Johnson v. Southern Ry. Co.*, 117 Fed. 462, 54 C. C. A. 681; *Fidelity Ins., Trust & Safe Dep. Co. v. Norfolk & W. R. R. Co.*, 90 Fed. 175.

§ 574 (400). Statutes are not to be construed as taking away a common-law right unless the intention is manifest. Accordingly where a particular defense is denied in case of rescous, but to render it available to a plaintiff the precise action mentioned in the statute must have been brought, the deprivation of that defense will not be enforced by an equitable construction in another form of action.¹⁴ Statutes which make an official deed or certificate evidence in derogation of the common law will be confined in their operation to the cases and the conditions expressly stated in them.¹⁵

“At common law a party could not be a witness for himself, to prove any part of the issue, and the statute authorizing it is not to be extended in his behalf beyond what it clearly imports.”¹⁶ Statutes which innovate upon the common-law rules of evidence or competency of witnesses must be strictly construed.¹⁷ Such innovating statutes may be remedial, and then they must, except as antagonized by other rules of construction, be liberally construed.¹⁸ Statutes which are claimed to abolish any of the incidents of marriage will be strictly construed.¹⁹ Statutes increas-

¹⁴ *Gray v. Nations*, 1 Ark. 557; *Melody v. Reab*, 4 Mass. 471; *Jacob v. United States*, 1 Brock. 520.

¹⁵ *Doughty v. Hope*, 3 Denio, 594; S. C., 1 N. Y. 79; *Graves v. Otis*, 2 Hill, 466; *Sharp v. Speir*, 4 id. 76; *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97.

¹⁶ *Dewey v. Goodenough*, 56 Barb. 54.

¹⁷ *Smith v. Randall*, 3 Hill, 495; *Dequaisie v. Harris*, 16 W. Va. 345; *Dyson v. West*, 1 Har. & J. 567; *Warner v. Fowler*, 8 Md. 25. See *Cummins v. Garretson*, 15 Ark. 135.

¹⁸ *Post*, §§ 592, 611.

¹⁹ *Neelly v. Lancaster*, 47 Ark. 175, 1 S. W. 66, 58 Am. Rep. 752;

S. C., 1 So. 66; *Harker v. Harker*, 3 Harr. 51; *Glover v. Alcott*, 11 Mich. 470; *Thomson v. Weller*, 85 Ill. 197; *Hays v. Hays*, 5 Rich. 31. In construing the married woman's act, says the high court of errors and appeals of Mississippi, we must look to the true spirit and object of the statute and construe its language with reference to the policy indicated by it. Before the passage of the act, a married woman was incapable of holding to her separate use property conveyed directly to her in her own name. The primary object of the statute was doubtless to remove that incapacity and to secure to her separate use all property which

ing the power of married women over their separate property, being in derogation of the rights of the husband and of the common law, are to be construed strictly.²⁰ They have not been interpreted to enlarge the capacity of the wife to contract, to hold or administer property, further than the words, fairly and reasonably construed according to their natural import, expressly declare.²¹ They are regarded as remedial in Michigan, and to be liberally construed to effectuate their general purpose. The disabilities are removed only so far as they operate unjustly and oppressively; beyond that they are suffered to remain. Having been removed with the beneficent design to protect the wife in the enjoyment and disposal of her property for the benefit of herself and family, the statutes cannot be ex-

she might acquire except the same should come from her husband; and hence provision, in the first place, is made enabling her to take by direct conveyance to her. But this is only a mode of accomplishing the end intended, the policy being to secure to the wife a complete title to all such property as might be acquired by her to her sole, separate use for the benefit of herself and her children. This was a new policy in our laws, founded upon enlarged views of protection and justice to the rights of a class of society entitled to the most liberal protection. It was a substantial right which the legislature intended to secure, rather than to prescribe the form necessary to be complied with in order to the enjoyment of the right: and, therefore, the spirit of the statute is to secure to the benefit of the wife and her children all property which may thereafter be conveyed to her separate use and benefit without regard to the form of the

conveyance. *Olive v. Walton*, 33 Miss. 103.

²⁰ *Compton v. Pierson*, 28 N. J. Eq. 229; *Kohn v. Collison*, 1 Marvel (Del.), 109, 27 Atl. 834; *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218; *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13.

²¹ *Cook v. Meyer*, 73 Ala. 580, 583; *Gibson v. Marquis*, 29 Ala. 668; *Canty v. Sanderford*, 37 id. 91; *Alexander v. Saulsbury*, id. 375; *Warfield v. Ravasies*, 38 id. 518; *Reel v. Overall*, 39 id. 138; *Hatton v. Wier*, 19 id. 127; *Perryman v. Greer*, 39 id. 133; *Cunningham v. Hanney*, 12 Ill. App. 437; *Triplett v. Graham*, 58 Iowa, 135, 12 N. W. 143; *Pettit v. Fretz*, 33 Pa. St. 118; *Morgan v. Bolles*, 36 Conn. 175; *Quick v. Miller*, 103 Pa. St. 67; *Weber v. Weber*, 47 Mich. 569, 11 N. W. 389; *Longey v. Leach*, 57 Vt. 377; *Dorris v. Erwin*, 101 Pa. St. 239; *Reynolds v. Robinson*, 64 N. Y. 589. See *contra*, *Billings v. Baker*, 23 Barb. 343; *Goss v. Cahill*, 42 id. 310.

tended by construction to cases not embraced by their language nor within this design.²² A statute provided that when a testator devised lands to his wife without declaring such devise to be in lieu of dower, it shall nevertheless so operate, and required her to make her election between them. That statute was designed as a rule of construction of wills, and to determine the intention of the testator where he has not expressed it. Being in derogation of the common-law rights of the widow it should be construed liberally as regards her. Had the testator declared this devise to be in lieu of dower, she would still have been entitled to her election. Should she elect to take the devise, and it wholly fails on account of a defect of title, of which she was ignorant, she could still claim dower.²³ A statute requiring certain liens to be registered cannot be extended to other liens than those specified.²⁴ The common-law rights of the subject in respect to the enjoyment of his property are not to be trenched upon by a statute, unless such intention is shown by clear words or necessary implication.²⁵ A statute to compel a party to give evidence against himself will be construed strictly.²⁶ So an act which takes away a remedy given by the common law ought never to have an equitable construction.²⁷

§ 575 (401). Statutes not remedial, which are in derogation of the common law of England, brought over by the colonists, so far as applicable to the new circumstances and conditions of the people and the country, and so far as not changed by legislation, are the law of the states generally; and courts will construe strictly all acts in modification or derogation thereof, assuming that the legislature has, in the terms used, expressed all the change it intended to make in the old law, and will not by construction or intendment en-

²² *De Vries v. Conklin*, 23 Mich. 255.

²³ *Thompson v. Egbert*, 17 N. J. L. 459, 466.

²⁴ *Tuttle v. Walton*, 1 Ga. 51.

²⁵ *Reg. v. Mallow Union*, 12 Ir. C. L. (N. S.) 35.

²⁶ *Broadbent v. State*, 7 Md. 416.

²⁷ *Hammond v. Webb*, 10 Mod. 281.

large their operation.²⁸ A statute preventing a concurrent action for the recovery of the mortgage debt, pending a foreclosure suit, is in derogation of the common law, and therefore to be strictly construed.²⁹ In construing statutes which are not penal nor liable to be used oppressively, the court will not stop at the literal terms nor stand upon form and circumstance, but will go to the effect and substance of the matter. Thus, where a law which provided a mode of submitting a cause to arbitration required that each party should choose one arbitrator, and if the arbitrators thus chosen failed to agree an umpire should be chosen by them, and it was objected that the award was not a good statutory award, on the ground that by the terms of the agreement each party appointed an arbitrator, who then appointed a third man, and the cause was tried by all three in the first instance, it was held that the objection went to the form merely, and it was not sustained.³⁰

§ 576 (402). **Interpretation clauses.**—Any provision in a statute which declares its meaning or purpose is authoritative. Whether it relates to the object of a whole act, or of a single section or of a word, it is a declaration having the force of law.³¹ It is binding on the courts, though otherwise they would have understood the language to

²⁸ *Hollman v. Bennett*, 44 Miss. 322; *Thompson v. Weller*, 85 Ill. 197; *Wilson v. Arnold*, 5 Mich. 98; *Fessenden v. Hill*, 6 id. 242; *Galpin v. Abbott*, id. 17; *Lee v. Forman*, 3 Met. (Ky.) 114; *Brown v. Fifield*, 4 Mich. 322; *Jackson v. Cairns*, 20 John. 301; *Pendleton v. Bank of Kentucky*, 2 J. J. Marsh. 148.

²⁹ *Hays v. Miller*, 1 Wash. Ty. 143.

³⁰ *Forshey v. Railroad Co.*, 16 Tex. 516.

³¹ *Jones v. Surprise*, 64 N. H. 243; 4 New Eng. Rep. 292; *State v. Adams*, 51 N. H. 568; *State v. Canter-*

bury, 28 id. 195; *Herold v. State*, 21 Neb. 50, 31 N. W. 258; *Chicago & Eastern Ill. R. R. Co. v. State*, 153 Ind. 134, 51 N. E. 924; *Harvey v. Clarinda*, 111 Iowa, 528, 82 N. W. 994; *State v. Schlenker*, 112 Iowa, 643, 84 N. W. 698, 84 Am. St. Rep. 360, 51 L. R. A. 347; *Powell v. Sherwood*, 162 Mo. 605, 63 S. W. 485; *State v. Plainfield Water Supply Co.*, 67 N. J. L. 357, 52 Atl. 230; *Commonwealth v. Curry*, 4 Pa. Supr. Ct. 356; *Snyder v. Compton*, 87 Tex. 374, 28 S. W. 1061; *Standard Cattle Co. v. Baird*, 8 Wyo. 144, 56 Pac. 598.

mean something different.³² Declaratory statutes having reference to other existing acts have the same effect prospectively.³³ Any contemporaneous construction of the same words by the legislature is high evidence of the sense intended.³⁴ So far as an act in terms professes to declare the past or present meaning of an existing statute, it is not legislative and not binding on the courts.³⁵ It has been said that an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, not so as to disturb the meaning of such as are plain.³⁶ It is often inserted for this purpose, or for abundant caution, that there may be no misapprehension, though the interpretation so directed is not different from that which the language used would otherwise receive.³⁷ In such cases this provision leads to no difficulties of construction. When, however, the clause is employed, as it often is, to make particular words mean something different or more than they naturally and ordinarily signify, it should be construed strictly.³⁸ An enactment based upon an evident misconcep-

³² *Commonwealth v. Curry*, 4 Pa. Supr. Ct. 356; *Smith v. State*, 28 Ind. 321. After the accounting officers of the federal treasury had put a construction upon certain statutes, another act of the same class was passed and application thereto of that construction was therein prohibited, and following the spirit of that prohibition the accounting officers refused to apply the disapproved construction to a still later statute of the same class. The supreme court refused to change this ruling. *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396.

³³ *Erhard v. Clearfield Coal Co.*, 5 Pa. Dist. Ct. 611.

³⁴ *Philadelphia, etc. R. R. Co. v. Catawissa R. R. Co.*, 53 Pa. St. 20, 60, 61.

³⁵ *Ante*, §§ 486, 487; *Rockhold v. Canton Mañonic Mut. Ben. Soc.*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420; *Kern v. Supreme Council*, 167 Mo. 471, 67 S. W. 252; *Finlayson v. Peterson*, 5 N. D. 587, 67 N. W. 953, 57 Am. St. Rep. 584, 33 L. R. A. 532; *Commonwealth v. Warwick*, 172 Pa. St. 140, 33 Atl. 373; *Commonwealth v. Warwick*, 4 Pa. Dist. Ct. 601; *Snyder v. Compton*, 87 Tex. 374, 28 S. W. 1061; *Re Handley's Estate*, 15 Utah, 212, 49 Pac. 829, 62 Am. St. Rep. 926.

³⁶ *Reg. v. Pearce*, L. R. 5 Q. B. Div. at p. 389.

³⁷ *Hardc. on St.* 104; *Wilb. on St.* 296.

³⁸ *Allsop v. Day*, 7 H. & N. at p. 463; *McGowan v. State*, 9 Yerg. 184; *Jackman v. Dubois*, 4 John. 216;

tion of what the law is will not have the effect, *per se*, of changing the law so as to make it accord with such misconception.³⁹ When a concise term is used which is to include many other subjects besides the actual thing designated by the words, it must always be used with due regard to the true, proper and legitimate construction of the act.⁴⁰

§ 577 (403). In England provisions of this nature have been discussed with marked disfavor;⁴¹ they embarrass rather than assist the courts in their decisions;⁴² they frequently do a great deal of harm by giving a non-natural sense to words, which are afterwards used in a natural sense without the distinction being noticed.⁴³ "It has been very much doubted," says Lord St. Leonards, L. C., "and I concur in that doubt, whether these interpretation clauses, which are of modern origin, have not introduced more mischief than they have avoided; for they have attempted to put a general construction on words which do not admit of such a construction in the different senses in which they are introduced in the various parts of an act of parliament."⁴⁴ An interpretation clause is not to receive a rigid construc-

Schmidt v. Hoyt, 1 Edw. Ch. 652. In State v. Canterbury, 28 N. H. at p. 228, Bell, J., says: "A small number of definitions were introduced in the Revised Statutes for the sake of brevity and to prevent the recurrence of several terms which, by a forced construction, might be included in a single word; but such definitions can, in the nature of things, have no effect, except in the construction of the statutes themselves. The meaning of language depends on popular usage, which is not and cannot, unless in a very slight degree, be affected by legislation." It was held that the statutory definitions would govern in the construction of the statute itself, but the same words in an in-

dictment founded on that statute would be construed entirely by the ordinary use of language. See State v. Adams, 51 N. H. 568; People v. Pico, 62 Cal. 50; Foltz v. Hoge, 54 Cal. 28.

³⁹ Davis v. Delpit, 25 Miss. 445; Byrd v. State, 57 id. 243, 34 Am. Rep. 440; Van Norman v. Jackson Circuit Judge, 45 Mich. 204.

⁴⁰ Midland Ry. Co. v. Ambergate Ry. Co., 10 Hare, at pp. 369, 370.

⁴¹ Wilb. on St. 296, 297.

⁴² Reg. v. Cambridgeshire Justices, 7 Ad. & E. at p. 491.

⁴³ Lindsay v. Cundy, L. R. 1 Q. B. Div. 358.

⁴⁴ Dean of Ely v. Bliss, 2 De G. M. & G. at p. 471.

tion, is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. It merely declares what persons and things may be comprehended within that term when the circumstances require that they should.⁴⁵

§ 578 (404). Where the interpretation clause is that a particular word shall include a variety of things not within its general meaning, it is a provision by way of extension, and not a definition by which other things are excluded.⁴⁶ When the meaning is thus extended the natural and ordinary sense is not taken away.⁴⁷ Blackburn, J., said: "It does not follow because in the interpretation clause they say that the expression 'new street' shall include certain other things we are to say it does not include its own natu-

⁴⁵ *Reg. v. Cambridgeshire Justices*, 7 Ad. & E. 491. A statute provided "that the word felony, when used in this or any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished with death, or by imprisonment in the state prison." "This provision," says Christiancy, J., "is but a legislative definition of the term felony as used in certain provisions of the statute; and its effect can only be known by reference to those provisions where the term is used. Of itself, without such reference, it has no effect upon any offense whatever. Nor can it be reasonably supposed that it was intended to extend to those provisions of the statute (of which there are two cases at least in the same revision), which in defining the offense have expressly designated it as a felony, and made it punishable in the state prison; for in such case no such general defi-

nition was required. Nor is there any more reason to infer that, where a particular provision of the same act (for the whole revision was passed as one act) has expressly designated a particular statute offense as a misdemeanor, this definition was intended to convert it into a felony, though the provision defining the offense has made it punishable by imprisonment in the state prison. We must therefore understand this provision as intended to apply only to those provisions where neither the particular offense nor its grade is otherwise indicated than by the use of the term felony, and where, therefore, the definition became necessary, as it was not intended to be used merely in the common-law sense." *Drennan v. People*, 10 Mich. 169, 173.

⁴⁶ *Reg. v. Kershaw*, 6 E. & B. at p. 1007.

⁴⁷ *Pound v. Plumbstead*, L. R. 7 Q. B. 183.

ral sense.”⁴⁸ An act provided that the word “ship” shall include “every description of vessel used in navigation not propelled by oars.” On the question whether a fishing boat twenty-four feet long, partially decked over, and fitted with two masts and a rudder, and also with four oars, which were sometimes used, was a ship within the meaning of the act, the same learned judge said: “The argument against the proposition that this is a ship is one which I have heard very frequently, viz.: that when an act says that certain words shall include certain things the words must apply exclusively to that which they must include. That is not so. The definition given of a ship is in order that the word ‘ship’ may have a more extensive meaning, and the words ‘not propelled by oars’ are not intended to exclude all vessels that are ever propelled by oars.”⁴⁹

§ 579 (405). These considerations have induced the legislature, in framing interpretation laws, to qualify them so that they are not to be observed and followed if such construction would be inconsistent with its manifest intent. With such modification, the rules of interpretation generally adopted aid not only legislators in drafting statutes, but also the courts in their exposition.⁵⁰ Among these rules are the following: Words importing the singular number only may extend to and embrace the plural number, and *vice versa*;⁵¹ words importing the masculine gender only may extend to and be applied to females as well as males; the word “person” may extend and be applied to bodies politic and corporate as well as to natural persons;⁵² the word

⁴⁸ Id.

⁴⁹ Ferguson, Ex parte, L. R. 6 Q. B. 291. See The Gauntlet, L. R. 3 Adm. 381.

⁵⁰ “When the legislature issues a codification or revision of laws, and as a part of it lays down definitions and rules of construction of terms therein used, the courts get at the meaning of the law-

makers by applying those definitions to those terms and following those rules of construction.” State v. Allison, 155 Mo. 325, 330, 56 S. W. 467.

⁵¹ Harris v. Register, 70 Md. 109, 16 Atl. 386; Hogan v. State, 36 Wis. 226, 247.

⁵² See Tewksbury v. Schulenberg, 41 Wis. 584.

"issue" shall be construed to include all the lawful lineal descendants; land or real estate shall be construed to include land, tenements and real estate and all rights thereto and interests therein; the word "oath" shall include an affirmation; the word "month" or "year" shall be construed to mean a calendar month or year. Such a definition of land and real estate is statutory in Michigan, but the statute in regard to executions required chattels, real or personal, of the debtor to be taken and sold by one ceremony, and his real estate by another. These provisions were deemed to countervail the statutory definition of land and real estate; therefore a sale of a leasehold estate as land by the proceedings appropriate to the latter kind of property was held to pass no title.⁵³ In the General Statutes of Michigan it is provided that "the words 'annual meeting,' when applied to townships, shall be construed to mean the annual meeting required by law to be held in the month of April," and that "the words 'general election' shall be construed to mean the election required by law to be held in the month of November."⁵⁴ In a special statute creating the city of Pontiac it was provided that "nothing in this act shall operate to prevent the holding of the *annual meetings* of the township of Pontiac . . . in said city, as though this act had not passed." It was held that the general election in November for the township could not be held in the city under the saving clause. The latter was strictly construed in harmony with the legislative definition.⁵⁵ A statute of the same state requires that deeds shall be executed in the presence of two witnesses, "who shall subscribe their names to the same as such."⁵⁶ A question arose whether a deed was executed where a marksman, whose name was written as a subscribing witness by another, had thus witnessed, as one of the subscribing wit-

⁵³ Buhl v. Kenyon, 11 Mich. 249.
See Westervelt v. People, 20 Wend.
416.

⁵⁵ People v. Knight, 13 Mich. 424.
See Westinghausen v. People, 44 id.
285, 6 N. W. 641.

⁵⁴ 1 How. St., § 2, subd. 4 and 19.

⁵⁶ 2 How. St., § 5658.

nesses, he having made his mark in connection with his name. It was held a compliance with the statute, it being prescribed by the defining provisions that "in all cases where the written signature of any person is required by law it shall be in the proper handwriting of such person, or, in case he is unable to write, his proper mark."⁵⁷ Where a statutory construction act has been passed, all future legislation will be presumed to have been enacted in view of the provisions of such act.⁵⁸ Where an act provides that it shall be liberally construed, it cannot be so construed as to carry it beyond its general scope and purpose, but the construction must be reasonable and within the intent and spirit of the act.⁵⁹

§ 580 (406). **Retrospective laws.**⁶⁰ — Such statutes, when not forbidden by the constitution, may be valid, but there is always a strong leaning against giving them a retrospective operation, and this proceeds from the presumption that the legislature does not intend what is unjust. "Those whose duty it is," says Erle, C. J., "to administer the law very properly guard against giving to an act of parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain and unambiguous language."⁶¹ Such laws are looked upon with general disfavor. In *Dash v. Van Kleeck*,⁶² Kent, C. J., said: "There has not been, perhaps, a distinguished jurist or elementary writer, within the last two centuries, who

⁵⁷ 1 How. St., § 2, subd. 17; *Brown v. McCormick*, 28 Mich. 215.

⁵⁸ *People v. Bremer*, 69 App. Div. 14, 74 N. Y. S. 570.

⁵⁹ *Elgin Hydraulic Co. v. Elgin*, 194 Ill. 476, 62 N. E. 929; *Badger v. Inlet Swamp Dr. Dist.*, 42 Ill. App. 79. And see *People v. Chicago Theological Seminary*, 174 Ill. 177, 51 N. E. 198; *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 23 S. C. Rep. 386; *Brown University v. Granger*, 19 R. I. 704, 36 Atl.

824, 36 L. R. A. 847; *Sherman v. Langham*, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258, 260.

⁶⁰ The subject of retrospective laws is treated in ch. XVII.

⁶¹ *Midland Ry. Co. v. Pye*, 10 C. B. (N. S.) 191; *Bay v. Gage*, 36 Barb. 447; *Chew Heong v. United States*, 112 U. S. 536, 5 S. C. Rep. 255, 28 L. Ed. 770; *Maxwell v. Bay City*, 46 Mich. 278; *post*, § 673.

⁶² 7 John. at p. 506.

has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with caution, distrust or disapprobation."

§ 581 (407). **Construction of acts affecting previous statutory policy.**—It has often been judicially said that the policy of the law is too vague and capricious a consideration to have much weight in the construction of a statute. "What is termed the policy of the government," says Field, J., "with reference to any particular legislation, is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."⁶³ It was remarked in *Municipal Building Society v. Kent*,⁶⁴ that "it is never very safe ground in the construction of a statute to give weight to views of its policy which are themselves open to doubt and controversy." It is not within the province of the courts to judge of the wisdom or expedience of a statute.⁶⁵ With the policy of the law the courts have but little concern in construing an act of the legislature. The intention should be ascertained from its language, if possible, considered in connection with the every-day wants and objects of the people for whose government the same is enacted. That being ascertained and effectuated, the duty of the court is performed, whether the policy thereby subserved be good or bad.⁶⁶ But it happens sometimes that the intention is not clearly expressed or is uncertain. Then the hardship, the injustice, and, in every point of view, the effects and consequences of particular constructions of a statute, will be considered; and the best effect of the law, consistent with its language, ascer-

⁶³ *Hadden v. The Collector*, 5 *People v. Hoym*, 20 *id.* 76; *People v. Lawrence*, 36 *Barb.* 177.

⁶⁴ *L. R.* 9 *App. Cas.* 273.

⁶⁵ *Pool v. Wedemeyer*, 56 *Tex.* 287;

⁶⁶ *Reithmiller v. People*, 44 *Mich.* 280, 6 *N. W.* 667; *Sheley v. Detroit*, 45 *Mich.* 431, 8 *N. W.* 52; *Lindenmuller v. People*, 21 *How. Pr.* 156; *Coffin v. Rich*, 45 *Me.* 507, 71 *Am. Dec.* 559; *Bosley v. Mattingly*, 14 *B. Mon.* 89; *Baxter v. Tripp*, 12 *R. I.* 310.

tained in the light of all available aids to a true understanding of its meaning, will be deemed that intended by the legislature.⁶⁷ Arguments upon the policy of the law, though undoubtedly admissible, are to be listened to with much caution. The interpreters of the law have not the right to judge of its policy; and when they undertake to find out the policy contemplated by the makers of the law, there is a great danger of mistaking their own opinions on that subject for the opinions of those who had alone the right to judge of matters of policy.⁶⁸ But after a statutory system or policy has been long established and is well defined, it will not be lightly presumed to be departed from or abandoned.⁶⁹ General language will be restricted to bring the act into harmony with it.⁷⁰ Equivocal words will not be accepted as implying an intent to depart from a settled statutory policy.⁷¹ General words are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon them consistently with the intention of preserving the existing policy untouched.⁷²

⁶⁷ *People v. Canal Com'rs*, 3 Scam. 153; *Collins v. Carman*, 5 Md. 503; *Putnam v. Longley*, 11 Pick. 487; *ante*, §§ 456, 470.

⁶⁸ *Roberts v. Cannon*, 4 Dev. & Bat. L. 267.

⁶⁹ *State v. Hickman*, 11 Mont. 541, 29 Pac. 92; *Nashville, C. & St. L. Ry. Co. v. Jones*, 100 Tenn. 512, 45 S. W. 681; *Hand v. Cole*, 88 Tenn. 400, 12 S. W. 922.

⁷⁰ *Greenhow v. James*, 80 Va. 636, 56 Am. Rep. 603.

⁷¹ *Attorney-General v. Smith*, 31 Mich. 359; *Blackwood v. Van Vliet*, 30 id. 118; *Rowley v. Stray*, 32 id. 70; *Baxter v. Tripp*, 12 R. I. 310; *Grenada Co. v. Brogden*, 112 U. S. 261, 5 S. C. Rep. 125, 28 L. Ed. 704; *Fort v. Burch*, 6 Barb. 60.

⁷² *Minet v. Leman*, 20 Beav. 269.

CHAPTER XV.

LIBERAL CONSTRUCTION.

§ 582 (408). **General statement of the subject.**—The law favors a liberal construction of certain statutes to give them the most beneficial operation. When they are liberally construed, the principles which induce strict construction are not lost sight of nor ignored. Liberal construction is given when these principles do not so antagonize it as to make it unjust. Two classes of statutes are liberally construed — remedial statutes, and statutes which concern the public good or the general welfare. What are such statutes, in the sense of being subject to liberal construction? Taken broadly, as thus generally characterized, they would include all législation. This is not practically the scope of such construction; other principles govern and make the law conservative in the interpretation of statutes and their enforcement in the cases and upon the considerations discussed in the last chapter. Blackstone says that for the purpose of ascertaining the boundaries of right and wrong, and the methods which the law takes to command the one and prohibit the other, it consists of several parts; “one *declaratory*, whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down; another *directory*, whereby the subject is instructed and enjoined to observe those rights and abstain from the commission of those wrongs; a third, *remedial*, whereby a method is pointed to recover a man’s rights or redress his private wrongs.”¹ This eminent writer adds that the declaratory and directory parts stand much upon the same footing, and the remedial part so necessary a consequence of those other

¹1 Cooley’s Black. Com. 55.

parts that the laws would be very vague and imperfect without it.² On a subsequent page he says that "statutes also are either declaratory of the common law or remedial of some defects therein;" that "remedial statutes are those which are made to supply such defects and abridge such superfluities in the common law as arise either from the general imperfection of all human laws, from change of time and circumstances, from mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other causes whatever."³

§ 583 (409). Remedial statutes to be liberally construed—**What are remedial statutes.**—In the modern sense remedial statutes not only include those which so remedy defects in the common law, but defects in our civil jurisprudence generally, embracing not only the common law, but also the statutory law. They are in a general sense remedial whether they correct defects in the declaratory, directory or remedial parts, as the author just quoted has defined them. There are also the three points mentioned by the author to be considered in the construction of all remedial statutes — the old law, the mischief, and the remedy; that is, how the law stood at the making of the act; the mischief for which that law did not adequately provide, and what remedy the legislature has supplied to cure this mischief. And it is the duty of judges so to construe the act as to suppress the mischief and advance the remedy.⁴ This injunction is simply to carry out the intention of the law-maker, which is the cardinal aim with reference to all statutes. The intention in statutes which are for this purpose recognized as remedial or enacted *pro bono publico* is more liberally inferred, and to a greater extent dominates the letter, than is admissible in dealing with those which must be strictly construed.

§ 584 (410). Broad as is the definition of statutes to be liberally construed, none will be excluded from the category except where some other paramount rule governs. Penal statutes, and many others for special reasons, are excluded.

² 1 Cooley's Black. Com. 55. ³ 1 Cooley's Black. Com. 86, 87. ⁴ Id.

The letter of remedial statutes may be extended to include cases clearly within the mischief they were intended to remedy, unless such construction does violence to the language used; but a consideration of the old law, the mischief, and the remedy, is not enough to bring cases within the purview of penal statutes, nor, indeed, any statute which must be strictly construed. Cases must be expressly included by the words of these statutes to be governed by them. This is all the difference between a liberal and a strict construction. A case may come within one unless the language excludes it; while it is excluded by the other unless the language includes it.⁵ Construction, whether it be liberal or strict, is an inquiry for and a determination of the law-makers' intention to give effect. "As for construing a statute by equity," Lord Mansfield said, "equity is synonymous to the meaning of the legislature."⁶ So conservative, however, is the law as to severe statutes, which, therefore, must be construed strictly, that every case must be brought within both their letter and their spirit.⁷ A remedial statute must be construed largely and beneficially so as to suppress the mischief and advance the remedy. And if its words are not clear and precise, such construction will be adopted as shall appear the most reasonable and the best suited to accomplish its object; a construction which would lead to an absurdity will be rejected.⁸ And, generally, it may be affirmed that, if a statute may be liberally construed, everything is to be done in advancement of the remedy or the purpose intended that can be done consistently with any construction that can be put upon it.⁹ The substance of the act is principally regarded and the letter is not too closely adhered to.¹⁰ A remedial statute must be construed, if possible, so

⁵ *State v. Powers*, 36 Conn. 77.

⁸ *Sprowl v. Lawrence*, 33 Ala. 674;

⁶ *Rex v. Williams*, 1 W. Black. 93; *Blakeney v. Blakeney*, 6 Port. 109, 30 Am. Dec. 574; *Mayor, etc. v. Root*, 8 Md. 95; *Woodruff v. State*, 3 Ark. 284.

Gilkey v. Cook, 60 Wis. 133, 18 N. W. 639.

⁹ *Atcheson v. Everett*, 1 Cowp. 391; *Johnes v. Johnes*, 3 Dow, 15; *Turtle v. Hartwell*, 6 T. R. 426.

⁷ *Ante*, § 520.

¹⁰ *Moody v. Threlkeld*, 13 Ga. 55.

as to correct the mischief at which it is aimed;¹¹ though, if the language is very explicit, there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.¹²

§ 585 (411). The courts construe remedial statutes most liberally to suppress the mischief and advance the remedy.¹³ This principle operates to exclude as well as to include cases in furtherance of the law-makers' intention. That which is not in the purpose or meaning, nor within the mischief to

¹¹ *Fox v. Sloo*, 10 La. Ann. 11; *Fox v. New Orleans*, 12 id. 154, 78 Am. Dec. 766; *Davenport v. Barnes*, 2 N. J. L. 211; *Wilber v. Paine*, 1 Ohio, 117; *Pancoast v. Ruffin*, 1 Ohio, 177; *Lessee of Burgett v. Burgett*, 1 Ohio, 219, 13 Am. Dec. 634; *McCormick v. Alexander*, 2 Ohio, 74; *Franklin v. Franklin*, 1 Md. Ch. 342.

¹² *Denn v. Reid*, 10 Pet. 524, 9 L. Ed. 519; *Guthrie v. Fisk*, 3 B. & C. at p. 182; *Brandling v. Barrington*, 6 B. & C. 475.

¹³ *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130; *Buck v. Eureka*, 97 Cal. 135, 31 Pac. 845; *Union Pac. Ry. Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350; *Fee v. Brown*, 17 Colo. 510, 30 Pac. 340; *Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238; *Tyler v. Mut. Dist. Messenger Co.*, 13 App. Cas. (D. C.) 267; *Schooner Thompson v. Martin*, 16 App. Cas. (D. C.) 222; *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; *Farwell v. Cohen*, 138 Ill. 216, 28 N. E. 35, 32 N. E. 893; *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553; *Conrad v. Crowdsen*, 75 Ill. App. 614; *Carterville Coal Co. v. Abbott*, 81 Ill. App. 279; S. C.

affirmed, 181 Ill. 495, 55 N. E. 131; *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; *O'Brien v. Moss*, 131 Ind. 99, 30 N. E. 894; *Arnold v. Arnold*, 140 Ind. 199, 39 N. E. 862; *Tombaugh v. Grogg*, 146 Ind. 99, 44 N. E. 994; *In re Sanders*, 58 Kan. 191, 36 Pac. 348, 23 L. R. A. 603; *Brown v. Balfour*, 46 Minn. 68, 48 N. W. 604; *Heman v. McNamara*, 77 Mo. App. 1; *McIntosh v. Johnson*, 51 Neb. 33, 70 N. W. 522; *State v. Linn County*, 25 Ore. 503, 36 Pac. 297; *Godfrey v. Douglas County*, 28 Ore. 446, 43 Pac. 271; *Gore v. Clark*, 37 S. C. 537, 16 S. E. 614, 20 L. R. A. 465; *Rhea v. Greer*, 86 Tenn. 59, 5 S. W. 595; *Graham v. Strett*, 92 Tenn. 673, 22 S. W. 738; *Bank v. State*, 18 Wash. 73, 42 L. R. A. 33; *Denn v. Reid*, 10 Pet. 524, 9 L. Ed. 519; *Williams v. Paine*, 169 U. S. 55, 18 S. C. Rep. 279, 42 L. Ed. 658; *Beley v. Naphtaly*, 169 U. S. 353, 18 S. C. Rep. 354, 42 L. Ed. 775; *Farwell v. Cohen*, 138 Ill. 216, 28 N. E. 35, 32 N. E. 893; *Centerville Coal Co. v. Abbott*, 81 Ill. App. 279; *Gore v. Clark*, 37 S. C. 537, 16 S. E. 614, 20 L. R. A. 465; *Poling v. Parsons*, 38 W. Va. 80, 18 S. E. 379.

be remedied, is not included in the statute, even though it be within the letter.¹⁴ The courts follow the reason and spirit of such statutes till they overtake and destroy the mischief which the legislature intended to suppress.¹⁵ In doing so they often go quite beyond the letter of the statute.¹⁶ What is within the intention is within the statute though not within the letter; and what is within the letter but not within the intention is not within the statute.¹⁷

§ 586 (412). The intention is not something evinced *dehors* the statute; it is to be learned from it, with those extrinsic aids to a correct interpretation to which resort may be had; and that intention, when satisfactorily ascertained, is the design to which the letter is subordinated. And it is ever to be borne in mind that the intention is to be collected from the words, the context, the subject-matter, the effects and consequences, the spirit and reason of the law, and other acts *in pari materia*.¹⁸ What is liberal construction can be better understood with these general principles in mind, by study of a multitude of well-considered cases, and by carefully considering the reciprocal influence of the principles which underlie the two modes of construction — strict and liberal. A liberal construction is given to remedial statutes, and statutes generally enacted for the public convenience and for its material welfare, except as modified or neutralized by the conservatism upon which strict construction is founded.

§ 587 (413). **Equitable construction.**—Early acts of parliament were brief and general in their terms. They were made to operate upon a very latitudinarian construction in

¹⁴ Taylor v. McGill, 6 Lea, 294.

¹⁵ Shumate v. Williams, 34 Ga. 251.

¹⁶ Id.; Henderson v. Alexander, 2 Ga. 81; Booth v. Williams, id. 252; Howard v. Central Bank, 3 id. 380; Ragland v. Justices, 10 id. 71; Canal Co. v. Railroad Co., 4 Gill & J. 152; Milburn v. State, 1 Md. 17.

¹⁷ Mayor, etc. v. Root, 8 Md. 95;

Chealy v. Brewer, 7 Mass. 259; State v. Boyd, 2 Gill & J. 374; Woodruff v. State, 3 Ark. 285; Brown v. Gates, 15 W. Va. 131; Eyston v. Studd, 2 Plowd. at p. 464.

¹⁸ Woodruff v. State, 3 Ark. 285.

both civil and criminal cases. The courts proceeded upon what was called the equity of the statute. "Equity," said Lord Coke, "is a construction made by the judges that cases out of the letter of the statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason thereof is, for that the law-makers could not possibly set down all cases in express terms."¹⁹ While this mode of construing statutes was in vogue, principles and instances of instances illustrative of them were announced which have become imbedded in the literature of the law; they still are quoted when courts give a very liberal construction to statutes. These are but relics of ancient hermeneutics which do not survive entire.²⁰

¹⁹ 1 Inst. 24b.

²⁰ There is in 2 Plowden, 465, an interesting and instructive review and *resumé* of construction of statutes by equity as practiced in the time of Queen Elizabeth.

The concluding words of the judgment in *Eyston v. Studd* will indicate the nature of that case.

"Wherefore a man ought not to rest upon the letter of an act, nor think that when he has the letter on his side he has the law on his side in all cases. For if a woman is seized of land in fee simple, and she intends to marry, and before the marriage she enfeoffs the father of him whom she intends to marry, to the intent that after the marriage he shall give the land back again to her and to him whom she intends to marry, with remainder over in tail, and afterwards they intermarry, and then the father gives the land to his said son and to his wife according to the intent, and they have issue, and the husband dies, and she levies a fine to

other uses, now the wife is within the words of the statute of 11 Hen. 7, for the land was given to her and her husband in tail by the ancestor of the husband, and after the death of the husband she has levied a fine to bar the issue; but notwithstanding that she is within the words of the act, yet she is out of the intent of the act, and therefore the issue shall not enter; for the estate-tail was made by the wife by circumstance, and is derived from her, and the father of the husband had the land to no other intent but to make the estate, and to that intent and purpose he was made use of as an instrument so that the effect of the whole matter was to make a jointure to the husband out of the land of the wife, which, although within the letter of the act of 11 H. 7, yet it is out of the intent of it, and consequently out of the purview." To this the reporter adds an exhaustive note. He says:

"From this judgment and the

It is said in Plowden,²¹ for which there were many instances, that “where an act is made to remedy any mischief, there, in order to aid things in like degree, one action has been used for another, one thing for another, one place for

cause of it the reader may observe that it is not the words of the law but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz., of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, *quia ratio legis est anima legis*. And the law may be resembled to a nut which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel. And as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law if you rely only upon the letter; and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter. And it often happens that when you know the letter you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. And equity, which in Latin is called *equitas*, enlarges or diminishes the letter according to his discretion, which equity is in two ways; the one Aristotle defines thus: *Equitas est correctio legis generatim latæ quâ parte deficit*, or as the passage is explained by Perionius: *Equitas est correctio quædam legi adhibita,*

quia ab ea abest aliquid propter generalem sine exceptione comprehensionem, both of which definitions come to one and the same thing. And this correction of the general words is much used in the law of England. As when an act of parliament ordains that whosoever does such an act shall be a felon and shall suffer death, yet if a man of unsound mind, or an infant of tender age who has no discretion, does the act, they shall not be felons, nor shall they be put to death. And if a statute be made that all persons who shall receive or give meat or drink or other aid to him that shall do such an act (knowing the same to be done), shall be accessories to the offense, and shall be put to death, yet if a man commits the act, and comes to his own wife, who knowing the same receives him, and gives him meat and drink, she shall not be accessory to his offense, nor a felon; for one that is of unsound mind, an infant, or a wife, were not intended to be included in the general words of the law. So that in these cases the general words of the law are corrected and abridged by equity. . . . And the statute of Westminster 1, cap. 4, touching wreck of the sea, ordains ‘that when a man, dog, or cat, escape alive out of the ship, such ship or anything within it shall not be adjudged

²¹ Hill v. Grange, 1 Plowd. at p. 178.

another, and one person for another, notwithstanding that in some cases the thing is penal.²² The word "ancestor," in Westminster the First,²³ is extended so as to include predecessor.²⁴ The remedy given by the 9th Edward III.,

wreck, but the goods shall be saved and kept by view of the sheriff, coroner or king's bailiff, and delivered into the hands of such as are of the town where the goods were found, so that if any sues for the goods, and can prove that they were his, within a year and a day, they shall be restored to him without delay, and if not, they shall remain to the king, and shall be seized by the sheriff, coroner, etc., and be delivered to them of the town, who shall answer before the justices for the wreck which belongs to the king; and where wreck belongs to another than to the king, he shall have it in like manner; and he that does otherwise, and thereof is attainted, shall be awarded to prison, and make fine at the king's will, and shall yield damages also.' Now put the case that the goods in such ship are fresh victuals, as flesh, fresh fish, or apples, or oranges, or such perishable goods as cannot be kept for a year, and the sheriff sells them, and delivers the money arising from the sale of them to the town to answer for it, in this case he has broken the words of the act, and therefore, if we adjudge according to the words, the sheriff should be sent to prison, and be fined at the will of the king, and should pay damages;

but, on the other hand, if we follow the sense and meaning of the act, he has done well, and shall not be punished, for the meaning of the act is, that such things as could be kept for a year, without spoil or damage, should be kept so long, but if the things are so perishable that they cannot be preserved a whole year, nor perhaps two days, then it was not the intent of the makers of the act that the sheriff should let them fall to decay, but rather that he should immediately make the most of them he could; so that although the sheriff has done contrary to the words of the law by selling the goods within a year, yet he has not broken the law, but has punctually observed it, inasmuch as he has observed the intent and meaning of the makers of the law. . . . (The reporter states many other instances of implied exceptions from the general words in harmony with the intent, or to exclude cases not within the mischief, and proceeds to give the instances of enlarging the letter.) The other kind of equity differs much from the former, and is in a manner of quite a contrary effect, and may well be thus defined: *Equitas est verborum legis directio efficacius, cum una res fulummodo legis caveatur verbis, ut omnis alia*

²² See *Wheatley v. Lane*, 1 Williams' Saund. (& Williams' Notes), 216.

²³ 3 Edw. I., ch. 40.

²⁴ 2 Inst. 242.

chapter 3, against executors, was extended by equitable construction to administrators.²⁵ The statute of 1 Richard II., chapter 12, which forbade the warden of the Fleet to suffer his prisoners for judgment debts to go at large until

in equali genere eisdem caveatur verbis. And this definition seems agreeable to that of Bracton, which is thus: *Equitas est rerum convenientia quæ in paribus causis paria desiderat jura, et omnia bene coequiparet, et decitur equitas quasi æqualitas.* So that when the words of a statute enact one thing, they enact all other things which are in the like degree. As the statute which ordains that in an action of debt against executors he who comes first by distress shall answer, is extended by equity to administrators, and such of them as come first by distress shall answer by the equity of the said statute, *quia sunt in æquali genere.* And the act of 4 H. 4, cap. 8, gives a special assize to him who is disseized and ousted of his land by force, against the disseizor, and enacts that he shall recover against him double damages; and in the book of entries (Rasti), fo. 406, it appears that the plaintiff recovered by judgment double damages in an assize of nuisance for turning a water-course with force, to the nuisance of his mills, wherein it was found for the plaintiff; and yet there he was not ousted of his land, nor did he suffer any disseizin, but only a nuisance to the damage of his freehold, viz., his mills, whereof he continued seized; so that by the equity of the said statute the

plaintiff recovered his double damages for the nuisance, because it is in like degree with a disseizin of land.

"And the statute of Gloucester gives an action of waste and the punishment therein against him that holds for life or for years, and by the equity thereof a man shall have an action of waste against him who holds but for a year, or for twenty weeks, and yet this is out of the words of the act, for he that holds but for one year does not hold for years; but it is within the intent of the act, and the words which enact the one do by equity enact the other. And so there are an infinite number of cases in our law which are in equal degree with others provided for by statutes, and are taken by equity within the meaning of those statutes. And from hence, it appears that there is a great diversity between these two equities, for the one abridges the letter, the other enlarges it; the one diminishes it, the other amplifies it; the one takes from the letter, the other adds to it. So that a man ought not to rest upon the letter only, *nam qui hæret in litera, hæret in cortice*, but he ought to rely upon the sense, which is tempered and guided by equity, and therein he reaps the fruit of the law; for as a nut consists of a shell and a ker-

²⁵ *Eyston v. Studd*, 2 Plowd. 464. at p. 526.

See *Hoguet v. Wallace*, 28 N. J. L.

they had satisfied their debts, was held to include all jailors.²⁶ The statute of Westminster 2, chapter 31, which gave the bill of exceptions to the ruling of the judges of the common pleas, was held applicable to the other judges of the

nel, so every statute consists of the letter and the sense, and as the kernel is the fruit of the nut, so the sense is the fruit of the statute. And in order to form a right judgment when the letter of a statute is restrained, and when enlarged by equity, it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity; then you must give yourself such an answer as you imagine he would have done, if he had been present. As, for example, in the case before mentioned where the strangers scale the walls, and defend the city, suppose the law-maker to be present with you, and in your own mind put this question to him: Shall the strangers be put to death? Then give yourself the same answer which you imagine he, being an upright and reasonable man, would have given, and you will find that he would have said, 'they shall not be put to death.' . . . And therefore when such cases happen which are within the letter, or out of the letter of a statute, and yet don't directly fall within the plain and natural purport of the letter, but are in some measure to be conceived in a different idea from that which the text seems to express, it is a good way

to put questions and give answers to yourself thereupon, in the same manner as if you were actually conversing with the maker of such laws, and by this means you will easily find out what is the equity in those cases. . . . And where the statute of 37 H. 8, cap. 8, took away clergy from him that stole any horse, and the statute of 1 Edw. 6, cap. 12, enacted that those who were attainted of stealing horses should not have their clergy, but that in all other cases of felony persons attainted should have their clergy, I by no means commend the scrupulosity of the judges in these times who took the law to be thereupon, that he who stole one horse only should have his clergy, and therefore procured the act of 2 Edw. 6, cap. 33, to be made, which ousted him of his clergy who stole one horse only; for where the statute speaks of stealing horses, although it speaks in the plural number, yet, by equity (which considers the intent of the legislature), it ought also to comprehend one singular horse only, and that as fully as if it had said horses or horse; and the clause in the act which says that in all other cases of felony persons attainted thereof shall have their clergy is to be interpreted and intended of others than those who steal horses or a horse; for, as the statute of Glou-

²⁶ Platt v. Lock, 1 Plowd. 35.

superior courts, and also to the county courts, the hundred and the courts baron; to the inferior courts, because their judges were still more liable to err.²⁷ The statute of Gloucester, chapter 11,²⁸ in speaking of London, was considered as intending to include all cities and boroughs equally, the capital having been named alone for excellency.²⁹ The statute, or writ of *circumspecti agatis*, 13 Edward I., which directs the judges not to interfere with the Bishop of Norwich or his clergy in spiritual suits, was construed as protecting all other prelates and ecclesiastics, the Bishop of Norwich being put but for an example.³⁰

§ 588 (414). Whatever the reasons for this latitudinary construction of statutes, whether it came from their being brief and general, framed by the judges themselves, and the uncertainty of the line dividing legislative from judicial functions, it is part of the history of the law. The underlying principle is obsolete,³¹ though to a limited extent it still exercises some influence in the domain of liberal construction. Some examples of it are yet made to do duty, as fit illustrations of the expansive and elastic quality of remedial laws.³² The principle on which the courts proceeded in giving effect to the equity of a statute seems

chester, which gives an action of waste against him that holds for years, in the plural number, may be taken to comprehend him who holds but for one year, so may the said statute which speaks of horses in the plural number be interpreted to comprehend one horse in the singular number. And if it be said that the law is penal in this case, to this it may be answered that so it is also in the other case; but equity knows no difference between penal laws and others, for the intent (which is the only thing regarded by equity, as may appear to every one who pursues the

method of inquiry by way of question and answer in the manner before intimated) ought to be followed and taken for law, as well in penal laws as in others." See *Wimbish v. Tailbois*, 1 Plowd. 38.

²⁷ 2 Inst. 426; *Strother v. Hutchinson*, 4 Bing. N. C. 83.

²⁸ 6 Edw. I.

²⁹ 2 Inst. 321; *Endlich, Int. St.*, § 322.

³⁰ *Id.*; 2 Inst. 487.

³¹ *Hardcastle on St.* 39; *Ex parte Walton*, L. R. 17 Ch. Div. 750.

³² *Simonton v. Barrell*, 21 Wend. 362; *United States v. Freeman*, 3 How. at p. 565, 11 L. Ed. 724.

to have been that of supplementing the statute by extending it to like cases, and arresting its operation in cases not deemed to be within its purpose. It has an ingredient of legislative discretion,³³ and is not strictly or solely a principle of construction. The court did what it was supposed from the act passed the legislature would have done had its attention been called to the similar case in hand. They applied the common-law maxim, *quod in uno similitum valet, valebit in altero*, or, as Coke puts it, "If they be in like reason, they are in like law."³⁴ Lord Westbury spoke of equitable construction of statutes as "a mode of interpretation very common with regard to our earlier statutes, and very consistent with the principle and manner according to which acts of parliament were at that time framed."³⁵ In *Guthrie v. Fisk*,³⁶ Bayley, J., denounced it as "a dangerous rule of construction to introduce words not expressed because they may be supposed to be within the mischief contemplated." And another learned judge on the English bench said: "I think there is always danger in giving effect to what is called the equity of a statute, and that it is much better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them."³⁷ Lord Camden³⁸ said: "Where it is clear the person or thing expressed is put by way of example, the judges must fill up the catalogue; yet we ought to be sure, from the words and meaning of the act itself, that the thing or person is really inserted as an example. . . . Whenever this rule is to take place, the act must be general, and the thing expressed must be particular. . . . In all cases that fall within this rule, there must be a perfect resemblance between the persons or things expressed and those implied."

³³ *Annan v. Houck*, 4 Gill, at p. 332.

³⁴ *Coke Lit.* 191a.

³⁵ *Hay v. Lord Provost of Perth*, 4 Macq. Sc. App. at p. 544.

³⁶ 3 B. & C. at p. 183.

³⁷ Lord Tenterden in *Brandling v. Barrington*, 6 B. & C. at p. 475.

³⁸ *Entick v. Carrington*, 19 How. St. Tr. 1029, 1060.

§ 589 (415). **What is liberal construction.**—A statute extends no further than it expresses the legislative will. When it is held to embrace a case which is within its spirit, though not within its letter, it is not meant that the courts have authority to extend a statute to cases for which it does not by its words provide, or beyond the sense of its language. A statute is a written law, and it cannot be construed to have a sense and spirit not deducible from its provisions. It is a general rule that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction: the courts cannot arbitrarily subtract from or add thereto.³⁹ The modern doctrine is that to construe a statute liberally or according to its equity is nothing more than to give effect to it according to the intention of the law-maker, as indicated by its terms and purposes. This construction may be carried beyond the natural import of the words when essential to answer the evident purpose of the act; so it may restrain the general words to exclude a case not within that purpose.

§ 590 (416). There is no arbitrary form of words to express any particular intention; the intent is not identical with any phraseology employed to express it. Any language is but a sign, and many signs may be used to signify the same thing. In statutes the sense signified is the law; the letter is but its servant or its vehicle. Language is so copious and flexible that when general words are used there is an absence of precision, and all words and collocations of words admit of more than one interpretation.⁴⁰ In the construction of remedial statutes, while the meaning of the words is not ignored, it will be subordinated to their general effect in combination in a whole act or series of acts, read in the light of all the pertinent facts of every nature of which the courts take judicial notice. Liberal construc-

³⁹ *Tynan v. Walker*, 35 Cal. 634.

⁴⁰ See *Regina v. Skeen*, Bell, C. C. 134, per Pollock, C. B.

tion of any statute consists in giving the words a meaning which renders it more effectual to accomplish the purpose or fulfill the intent which it plainly discloses. For this purpose the words may be taken in their fullest and most comprehensive sense. Where the intent of the act is manifest, particular words may have an effect quite beyond their natural signification in aid of that intent.⁴¹

§ 591 (416). Illustrations.—The following cases appear to the writer to fitly illustrate the degree of elasticity of statutes which are to be liberally construed: An Alabama statute provided that “All actions of trespass *quare clausum fregit*, and actions of trespass to recover damages for injuries to personal property, may, if the plaintiff or plaintiffs die, be revived by his or her or their representatives in the same manner as actions upon contract.” This was held not to authorize the representatives to bring an action originally for such torts, but only to revive actions brought by plaintiffs who have died. Reasons may have influenced the legislature in giving a remedy in the one case which it was unwilling to extend in the other. In the former the deceased had himself elected to seek redress, and should his suit abate by his death his estate would be subjected to costs. In the latter he had brought no action, and may have intended to waive the wrong. “These considerations,” say the court, “it is possible, may have influenced the legislature in thus limiting the remedy. Be this as it may, the construction [that an original action might be brought on the equity of the statute] cannot be given to it unless we go, not only *ultra* the strict letter, but *contra* the letter also, which is inhibited by every just principle of construction.”⁴² A provision that all actions against sheriffs and coroners upon any

⁴¹ Wilberf. on St. 235; Avery v. 1 Cowp. at p. 391; State v. Powers, Groton, 36 Conn. 304; Smith v. Stevens, 82 Ill. 554; Dean and Chapter of York v. Middleburgh, 2 Y. & J. 196; Vigo's Case, 21 Wall. 648, 22 L. Ed. 690; Turtle v. Hartwell, 6 T. R. at p. 429; Atcheson v. Everitt, 36 Conn. 77; Hyde v. Cogan, 2 Doug. 699, 706; Houk v. Barthold, 73 Ind. 21.

⁴² Blakeney v. Blakeney, 6 Port. 115, 30 Am. Dec. 574.

liability incurred by them by the doing of any act in their official capacity, or by the omission of any official duty, shall be brought within three years after the cause of action shall have accrued, though construed very liberally, is held not to apply to actions for acts done merely *colore* but not *virtute officii*.⁴³ An act modified the common law with regard to the effect of the voluntary discharge of a defendant from arrest on a judgment by giving the plaintiff a remedy by further execution or other *process*. This word in strictness was held to mean only *scire facias*; but as the statute was remedial, it should be construed to include an action of debt also.⁴⁴

§ 592 (417). When the scope and intention of an act are ascertained by all the aids available, words whose ordinary acceptation is limited may be expanded to harmonize with the purpose of the act. This interpretation is admissible of statutes generally, but has a more liberal application to remedial and some other statutes which are liberally construed. It is applied to every case within the object of the act if it can reasonably be brought within its language. Thus in *Silver v. Ladd* ⁴⁵ the court held that in construing a benevolent statute enacted to confer a public benefit, by encouraging citizens to settle on distant portions of the public domain, the words "single man" may, in the light of the context showing the scope and purpose of the act, be taken in a general sense as including an unmarried woman.⁴⁶

§ 593 (418). An act which authorized justices to make orders in bastardy proceedings against the putative father

⁴³ *Morris v. Van Voast*, 19 Wend. 283.

⁴⁴ *Simonton v. Barrell*, 21 Wend. 362.

⁴⁵ 7 Wall. 219, 19 L. Ed. 138.

⁴⁶ This case may be taken as an illustration of the elasticity of words in an act to be liberally construed. It explained the provisions of the act of congress of the 27th of September, 1850, commonly

called the Donation Act. Miller, J., speaking for the whole court, said: "We admit the philological criticism that the words 'single man' and 'married man,' referring to the conjugal relation of the sexes, do not ordinarily include females; and no doubt it is on this critical use of the words that the decision of the Oregon court is mainly founded. But conceding to

of the bastard child of "any single woman" was held to include a widow, for the description did not mean never

it all the force it may justly claim, we are of opinion that it does not give the true meaning of the act, according to the intent of its framers, for the following reasons:

"1. The language is that there is hereby granted to 'every white settler or occupant of the public lands, above the age of eighteen years,' etc. This is intended to be the description of the class of persons who may take, and, if not otherwise restricted, will clearly include all women of that age as well as men.

"2. It is only in prescribing the quantity of land to be taken that the restrictive words are used, and even then the words are capable of being construed generically, so as to include both sexes. In the case of a married man it is clear that it does include his wife.

"3. The evident intention to give to women as well as men is shown by the provision that, of the six hundred and forty acres granted to married men, one-half shall go to their wives, and be set apart to them by the surveyor-general, and shall be held in their own right. Can there be any reason why a married woman, who has the care and protection of a husband, and who is incapable of making a separate settlement and cultivation, shall have land given to her own use, while the unprotected female, above the age of eighteen years, who makes her own settlement and cultivation, shall be excluded?

"4. But a comparison of the manifest purpose of congress and the language used by it, in section 4 of this statute, with those of section 5, will afford grounds for rejecting the interpretation claimed by defendants which are almost conclusive.

"The first of these sections applies, as we have already said, to that meritorious class who were then residing in the territory, or should become residents by the 1st of December thereafter. It extends to persons not citizens of the United States, to persons only eighteen years old, and it gives to each a half section of land. The fifth section makes a donation of half this amount, and is restricted to citizens of the United States, or those who have declared their intention to become citizens, and to persons over twenty-one years of age. But what is most expressive in regard to the matter under discussion is, that the very first line of that section, in which the class of donees is described, uses the words 'white male citizens of the United States.' Now when we reflect on the class of persons intended to be rewarded in the fourth section, and see that words were used which included half-breeds, foreigners, infants over eighteen, and which provided expressly for both sexes when married, and used words capable of that construction in cases of unmarried persons, and observe that in the next section, where they intend to be more re-

married;⁵¹ it included a married woman living apart from her husband, when his nonaccess is proved. Lord Denman, referring to 7 and 8 Vict., chapter 101, said in *Regina v. Collingwood*:⁵² "The language of the statute applies in terms only to single women; so did the language of 6 Geo. II., chapter 31; yet Lord Ellenborough, and the whole court in *Rex v. Luffe*,⁵³ held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances and for that purpose." Sergeant Godson, arguing for that construction, remarked that "the adultery of the wife places her in the position of a single woman." Lord Campbell, C. J., said, in *Regina v. Pilkington*:⁵⁴ "It would be strange if one class of bastards, though small, were left entirely destitute, and there were no liability in the putative father." A statute of Alabama provided that, "For any breach of any official bond or undertaking of any officer of this state, executor, administrator or guardian, or of any bond or undertaking given in an official capacity to the state of Alabama, or any officer thereof, the person aggrieved may sue in his own name, assigning the appropriate

strictive, in reference to quantity of land, to age of donee, citizenship, etc., they use apt words to express this restriction and then use the words 'white males' in reference to sex, we are forced to the conclusion that they did not intend, in section 4, the same limitation in regard to sex which they so clearly expressed in section 5. The contrast in the language used in regard to the sex of the donees in the two sections is sustained throughout by the other contrasts in the age and character of the donees, and the quantity of land granted." The context in this case shows that the donor did not intend to limit the donation to males;

hence the words "single man" and "married man" were brought into harmony with that intention by construing them in a generic sense.

In *Reg. v. Wymondham*, 2 Q. B. 541, in construing a statute relative to the settlement of a pauper, which is a statute to be strictly construed, the judges were not willing to construe "single and unmarried" persons as meaning also "not having children" or "never married."

⁵¹ *Reg. v. Wymondham*, 2 Q. B. 541; *Antony v. Cardenham*, Fortes. 309.

⁵² 12 Q. B. 681.

⁵³ 8 East, 193.

⁵⁴ 2 E. & B. 546.

breach.”⁵⁵ This statute was declared remedial. It was intended that suits on official and other bonds mentioned should be prosecuted by the party really aggrieved, in his own name, dispensing with the mere form, which obedience to the rule of the common law required, of introducing on the record, as nominal plaintiff, the obligee of the bond, who had no right or interest involved, and who could not control the suit — who was not answerable for costs, and could not release or discharge the recovery. The bond of a county treasurer, though a county and not a state officer, was not within the words of the section, if taken in a narrow or strict sense. But because such a bond, when the subject of a suit by an individual aggrieved by the county treasurer’s official delinquency, is as much within the mischief the section was intended to correct as other bonds coming within its letter, it is not a strained construction to read the statute as embracing it and the bond of any public officer.⁵⁶ A statute of the same state provided that, “Whenever any officer, required by law to give an official bond, acts under a bond which is not in the penalty, payable and conditioned as prescribed by law, such bond is not void, but stands in the place of the official bond, subject, on its condition being broken, to all the remedies which the person aggrieved might have maintained upon the official bond of such officer, executed, approved and filed according to law.” This section was held to apply to bonds which were in the penalty, payable and conditioned as prescribed by law, but which were not executed, approved and filed within the time limited thereby.⁵⁷

⁵⁵ Rev. Code of 1867, § 2552.

⁵⁶ *Morrow v. Wood*, 56 Ala. 1, 5, 6; *Sprowl v. Lawrence*, 33 id. 674.

⁵⁷ *Sprowl v. Lawrence*, 33 Ala. 685. In this case the court say: “An examination of the various provisions of the code in reference to the bonds of public officers will satisfy any one of the studious solicitude

with which the legislature has sought to afford the most ample protection to all persons interested in the performance by such officers of their official duties. The section we are considering is a part of the legislation designed to effect this general object, and it is our duty to put upon it such a construction

§ 594 (419). Where the words of a statute prescribing compensation to a public officer are loose and obscure and admit of two interpretations they should be construed in favor of the officer. This was held by Story, J., in the con-

as will harmonize with the substance and spirit of the text to which it belongs. It is a remedial statute, and we must construe it largely and beneficially so as to suppress the mischief and advance the remedy; or, in the language of Lord Coke, so as 'to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*.' *Hayden's Case*, 3 Rep. 7; *Sedgwick on St.* 359-60. It must be admitted that the words of this section are not as clear and precise as they might be; and it is a well-settled rule that, when the words are not precise and clear, such construction will be adopted as shall appear the most reasonable and best suited to accomplish the object of the statute; and a construction which would lead to an absurdity ought to be rejected.

"Viewing section 132 (quoted in the text) in the light of these rules, we cannot assent to the construction of it urged by the counsel for the appellee. The result to which that construction leads demonstrates, in our opinion, its fallacy. By section 120 it is declared that the bond of any officer which is not in the penalty, and payable and conditioned as prescribed by law, 'should not be approved,' and that the officer approving the same 'neglects his duty.' Section 132 is evidently based on the supposition that bonds which were not in the

penalty, and payable and conditioned as prescribed, would, or to say the least might, not be approved and filed; and this for the simple reason that the officers intrusted with the authority to approve and file are advised by an emphatic admonition from the legislature that such bonds 'should not be approved' and that no bond shall be filed unless first approved. *Code*, §§ 120, 126. Hence the language is that such a bond, if the officer executing it '*acts under it*,' shall be subject to all the remedies which could be maintained 'on the official bond of such officer, executed, *approved and filed according to law*.' These last words seem to imply that a bond which did not conform to the statutory requirements as to penalty, payee and condition would not be executed, approved or filed according to law. And yet, if the sheriff *acts under* such a bond, it stands in the place of and is subject to all the remedies which could be maintained upon the official bond of such officer, executed in all respects in strict conformity to the statute. Hence we conclude that, so far as the operation of section 132 is concerned, it makes no difference whether the bonds there spoken of have or have not been approved and filed. The bonds referred to in that section could not be properly approved or filed; for the law expressly declares that bonds thus defective *should*

struction of a statute authorizing the secretary of the treasury to limit and fix the number and compensation, among others, of deputy collectors, with a proviso that no such deputy, in certain named districts, should receive more than \$1,000, "nor any such other deputy more than \$1,000 for any services he may perform for the United States in any office or capacity." That eminent judge and jurist said the last clause was obscurely drawn, and, "after weighing the subject with a good deal of care, I have come to the conclusion that the true intent and meaning of the clause is to limit the emoluments of the deputy collector in that office to the sum specified, and to make no allowance to him on account of any incidental services he may perform or emoluments he may receive beyond that sum; and that it was not intended to say that if he actually performed the duties or services of any other independent office, such as inspector, in any of the non-enumerated ports, he was not entitled to receive the emoluments thereof. In short, I read the language as if it were 'in any *such* office or capacity.'"⁵⁸ A Missouri statute was: "The county in which the indictment is found shall pay the costs in all cases where the defendant is sentenced to imprisonment in the county jail, and

not be approved, and that the officer who does approve them *violates his duty*. If a bond is approved and filed when it should not have been, and if the officer who approves and files it violates his duty in doing so, the act of approval and filing, it would seem, cannot be otherwise than nugatory as such, though it would doubtless be convenient and plenary proof of the delivery of the bond by the obligors. This section, therefore, in our judgment, applies to a bond which does not conform to any of the statutory requirements, either as to its penalty, payee, conditions, approval or filing,

provided the officer executing it has acted under it. Much more clearly does it apply to a bond which the officer executing it has acted under, and which does conform to all the requirements of the law except the last two, approval and filing. To hold otherwise would be to maintain the paradox that the validity of the bond is enhanced by its increased imperfections — that a total is less hurtful than a partial departure from the statute, and that an instrument in fact gets better as it grows worse."

⁵⁸ United States v. Morse, 3 Story, 87, Fed. Cas. No. 15,820.

to pay a fine, or either of these modes of punishment, and is unable to pay them.⁵⁹ A prosecution for an offense so punishable was dismissed by an agreement between the circuit attorney and the defendant, with the consent of the court, at the defendant's cost. The costs were taxed and an execution issued for them. It was held that the county was liable not only for the costs taxed, but also for the costs on the execution.⁶⁰ The statute of 38 Geo. III., chapter 87, section 1, says that "at the expiration of twelve calendar months from the death of a testator, if the executor to whom probate of the will has been granted is then residing out of the jurisdiction of his majesty's courts of law and equity, it shall be lawful to make a grant of administration to the persons interested." An executor was residing in the jurisdiction at the expiration of the twelve calendar months, and continued so to reside for four years. He then removed out of the jurisdiction, and at the date of the application was still residing abroad. The question was whether the statute applied to him. It was held that it did. The statute was held remedial to enable persons interested in the estate to enforce their claims. Lord Penzance said: "My difficulty arose on reading the words 'then residing;' but it was pointed out to me that if I restricted the operation of the statute to the case of the executor residing out of the jurisdiction at the expiration of twelve months, the intention of the statute could hardly be worked out."⁶¹

§ 595 (419). In *Evans v. Jones*⁶² the court of great session was abolished, and a statute provided that "the court of common pleas shall have the like power and authority

⁵⁹ Gen. St., ch. 219, § 2.

⁶⁰ *State v. Buchanan Co. Ct.*, 41 Mo. 254.

⁶¹ *In the Goods of Ruddy*, L. R. 2 P. & D. 330.

⁶² 9 Bing. 311. In this case a liberal construction was allowed on the authority of cases decided upon the equity of statutes. "Many

instances," says the Lord Chief Justice, "occur in the books of similar construction of statutes. The 9 Rich. II., ch. 3, gives a writ of error to him *in reversion*, if a tenant for life lose in a *precipe*; but it was resolved, that though the statute speaks only of reversions, yet remainders are also taken

to amend the records of fines and recoveries passed heretofore in any of the courts abolished by this act, as if the same had been levied, suffered or had in the court of common pleas." On this statute the question arose whether, under the power to *amend*, an entire record could be made. Tindal, C. J., said: "We think this provision of the statute is remedial, and, consequently, that it should receive, not a strict, but so far a liberal, construction as will meet and remove the difficulty which the act itself has created."

An insolvent act invalidated voluntary conveyances made by insolvents "within three months before the commencement of the imprisonment." That language would exclude the time of imprisonment; so that, taken literally, conveyances during such time would not be invalidated. But, being construed liberally to carry out the obvious intention of the act, it was interpreted as if the words had been "within the period commencing three months before the imprisonment." ⁶³

§ 596 (420). It was provided by a statute of Georgia that, "when any guardian, executor or administrator chargeable with the estate of any *orphan* or deceased person to him, her or them committed, shall die so chargeable, his, her or their executors or administrators shall be compellable to pay out of his, her or their estate so much as shall appear

to be within the purview thereof. Winchester's Case, 3 Rep. 4. The action of debt for an escape, which is against every sheriff and gaoler where the prisoner escapes out of execution, is grounded upon the statute of 1 Rich. II., ch. 12, which is altogether silent about sheriffs and gaolers, and mentions only the warden of the Fleet. So the statute of *circumspecti agatis* (13 Edw. I.), which mentions only the Bishop of Norwich, has been always extended to include all other bishops. 2 Inst. 487. The statute of West-

minister I gives a remedy where 'outrageous toll is taken;' by construction of law that remedy applies either where a reasonable toll is due and excessive toll is taken, and when no toll at all is due, and yet toll is unjustly usurped. 2 Inst. 220. In these and many other instances, the particular expression used in the statute is looked upon only as an example of other cases lying within the same mischief, and, therefore, calling for the same remedy."

⁶³ Becke v. Smith, 2 M. & W. 198.

to be due to the estate of such orphan or deceased person, before any other debt of such testator or intestate.”⁶⁴ The subject-matter of this statute is the estate or property of minors, and the purpose or motive of the legislature was its security and protection in the hands of a guardian at his death. Hence the word “orphan” included a child having separate property, though his parents were living. The usual popular meaning of words is ordinarily to be adopted, yet not necessarily nor universally. They are to be considered as having regard to the subject-matter; that is presumed to be always in the eye of the legislator. Hence when a word or words are of doubtful meaning, in the application of a statute, the subject-matter may dissolve doubts and fix their meaning so as to make it harmonious with the object of the legislature. “Looking to the subject-matter of this law,” say the court in *Ragland v. The Justices, etc.*,⁶⁵ “the estates of minors, and looking to the reason and object of the law, the protection of these estates, it will be impossible to conclude that when the legislature speaks of an orphan it meant to designate alone a minor whose parents are dead.” The following case shows a special application and use of the word *loan*: A township being unable to procure volunteers under a bounty law for \$300, the citizens voluntarily advanced money to pay bounties beyond that amount, with the understanding that it was to be repaid when a law should be passed authorizing taxation to repay them. An act was subsequently passed to repay “all loans made in good faith,” and it was held that this law authorized the repayment of the sums so advanced. The loans contemplated were not loans in a *legal* sense; they had reference only to claims upon the conscience and moral sense of the community relieved thereby.⁶⁶ A right given by statute to “the owner or owners of land” to redeem land sold for taxes is to receive a liberal and benign construc-

⁶⁴ Cobb's New Dig. 288.

See *Miller v. Grandy*, 13 Mich. 540;

⁶⁵ 10 Ga. 65, 71.

People v. Supervisor, 14 id. 336.

⁶⁶ *Weister v. Hade*, 52 Pa. St. 474.

tion in favor of those whose estates will be otherwise divested, especially where the time allowed is short, and ample indemnity is given to the purchaser. It was so held in *Dubois v. Hepburn*.⁶⁷ "The purchaser," say the court, "suffers no loss; he buys with full knowledge that his title cannot be absolute for two years; if it is defeated by redemption, it reverts to the lawful proprietors. It would therefore seem not to be necessary for the purposes of justice, or to effectuate the objects of the law, that the right to redeem should be narrowed down by a strict construction." It was held that "any right which in law or equity amounts to an ownership in the land; any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it, makes the person the owner, so far as it is necessary to give him the right to redeem."⁶⁸ In construing the redemption laws the courts hold that the word "owner" is a generic term, which embraces the different species of interest which may be carved out of a fee-simple estate.⁶⁹ Statutes providing certain exemptions from tolls on turnpikes are held to be liberally construed in favor of agriculture. It was enacted that no toll should be demanded for any horse, beast or other cattle or carriage employed in carrying, among other things, "fodder for cattle." "No doubt," said Cockburn, C. J., "there is some difficulty at first sight in saying that barley in the course of transit to a mill for the purpose of being ground into meal, to be afterwards eaten by cattle, is already fodder for cattle; but, giving a fair and liberal construction to the words of the statute, I think that everything which is ultimately destined to be used as food for cattle is fodder for them, although it may not have gone through the final process which will

⁶⁷ 10 Pet. 1, 22, 9 L. Ed. 325.

⁶⁸ *Corbett v. Nutt*, 10 Wall. 464, 474, 19 L. Ed. 976; *Chapin v. Curteneus*, 15 Ill. 427; *Masterson v. Beasley*, 3 Ohio, 301; *Patterson v. Brindle*, 9 Watts, 98; *Jones v. Collins*, 16 Wis.

594, 605; *Winchester v. Cain*, 1 Rob. (La.) 421; *Karr v. Washburn*, 56 Wis. 303, 14 N. W. 189.

⁶⁹ *Blackwell on Tax Titles*, marginal p. 423; *Alter v. Shepherd*, 27 La. Ann. 207.

make it such.”⁷⁰ So a provision exempting carts loaded with manure was held to exempt them from toll if they were going empty to fetch manure.⁷¹ A “yoke” of oxen was held not necessarily to mean cattle broke to work. If they are intended by the owner for use as work cattle, and are old enough, they are a yoke within the exemption laws.⁷² Under a statute which authorizes an order for inspection of documents on application of either party upon an affidavit by such party, the affidavit must be made by the party himself.⁷³ But if a corporation is a party the order may be granted upon the affidavit of their attorney, it being impossible for them literally to comply with the terms of the statute, and it being the intention of the legislature that its benefit should be extended to all suitors.⁷⁴

§ 597 (421). An English statute relative to parish rates, which included corporations as rate payers, gave a right of appeal to any person or persons aggrieved by any rate, and the appellant was required to enter into a recognizance with two sureties. The court would not exclude corporations from being liable for rates, nor deny their right of appeal because they could not enter into a recognizance. They had the right of appeal if they were persons capable of being aggrieved, and the provision requiring a recognizance applied only to those who were capable of entering into it. A doubt, however, was suggested that a corporation could enter into a recognizance by appointing an attorney for that purpose.⁷⁵ Littledale, J., said: “Where an act of parliament directs a thing to be done which it is impossible for a

⁷⁰ *Clements v. Smith*, 3 E. & E. 238.

⁷¹ *Harrison v. James*, 2 Chitty, 547.

⁷² *Mallory v. Berry*, 16 Kan. 293. A pair of two-year-old steers, suitable for doing light work, are exempt under a statute exempting a pair of oxen. *Berg v. Caldwell*, 31 Minn. 541, 18 N. W. 821. But a

colt four months old and its dam do not make a span of horses. *Ames v. Martin*, 6 Wis. 361.

⁷³ *Herschfeld v. Clarke*, 11 Exch. 712; *Christopherson v. Lotinga*, 15 C. B. (N. S.) 809.

⁷⁴ *Kingsford v. Great W. Ry. Co.*, 16 C. B. (N. S.) 761.

⁷⁵ *Cortis v. Kent Water Works Co.*, 7 B. & C. 314.

corporation to do, but which other persons may do, and another act which a corporation as well as others can do, then the corporation will be excused from doing the thing which it cannot do, and will be compelled to do the act which it is capable of doing. Assuming, therefore, that a corporation cannot of itself enter into a recognizance, still its sureties may; and I think, therefore, that a corporation might satisfy this clause by procuring sureties to enter into such recognizance."⁷⁶

§ 598 (422). Statutes exempting property from execution are in many states, if not generally, construed liberally.⁷⁷ Sales of land on execution are statutory, and hence exemption of homesteads is not in derogation of any common-law right. They are humane, salutary as a factor in public economy, and generally construed liberally.⁷⁸ It has been held that to constitute a family within their meaning the relation of parent and child or that of husband and wife must exist; there must be a condition of dependence on the one or the other of these relations; but it is not necessary that all the dependents should live under the same roof or that the family should live together; it is the relation and the dependence on that relation, not the aggregation of the individuals, that constitutes the family.⁷⁹ Under a provision

⁷⁶ Id.; *State v. Morris Canal, etc. Co.*, 13 N. J. L. 192.

⁷⁷ *Thompson on Homesteads and Exemptions*, § 4; *Davis v. Humphrey*, 22 Iowa, 137; *Charles v. Lamberson*, 1 id. 435; *Comstock v. Bechtel*, 63 Wis. 656, 24 N. W. 465; *Binzel v. Grogan*, 67 Wis. 147, 29 N. W. 895.

⁷⁸ *Thompson on Homesteads and Exemptions*, § 4 and note; 45 Am. Dec. 252.

⁷⁹ *Sallee v. Waters*, 17 Ala. 482, 488; *Allen v. Manasse*, 4 id. 554; *Cantrell v. Conner*, 51 How. Pr. 45; *Garaty v. Du Bose*, 5 S. C. 493; *Cal-*

houn v. McLendon, 42 Ga. 405; *Neaf v. Sawyer*, 60 Ga. 352; *Dendy v. Gamble*, 64 id. 528. In the *Homestead Cases*, 31 Tex. 677, 98 Am. Dec. 553, *Lindsay, J.*, says: "What constitutes a family? Lexicographers, from whom in our literary education we derive all our knowledge of the correct import of words, tell us that the word 'family,' in its origin, meant servants; that this was the signification of the primitive word. It now, however, has a more comprehensive meaning and embraces a collective body of persons living together in one-

exempting "all tools and implements of trade" it has been held that the press and type of a practical printer, which are necessarily used by him and his journeymen in the publication of a weekly newspaper, were exempt under that term.⁸⁰

§ 599 (423). A statute of Wisconsin provided that on a writ of replevin from a justice's court the value of the property "shall be assessed according to the oath of one or more credible, disinterested persons whom the officer shall swear truly to assess the value thereof;" and that if on the return of any writ of replevin it shall appear that the value of the goods and chattels replevied shall have been assessed by the *jury* to be of greater value than the amount of which the

house, or within the curtilage, in legal phrase. This may be assumed as the generic description of a family. It may, and no doubt does, have many specific senses in which it is often used, arising from the paucity of our own as well as of all other languages. Examining and criticising the word in all its specific uses and appropriations, it will be most obvious that it was in none of these specific senses that the term 'family' was used in the constitution. Its use in such a sense would have been objectless and nugatory, because it would be wholly impracticable in its application to the civil affairs of mankind. It was most certainly used in its generic sense, embracing a household composed of parents and children or other relatives, or domestics and servants; in short, every collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object — the promotion of their mutual interests and social

happiness. These must have been the characteristics of the 'family' contemplated by the framers of the constitution in engrafting this provision upon it. It is, besides, the most popular acceptation of the word, and is more fully in unison with the beneficent conception of the political power of the state in making so humane and so wise a concession as that of the inviolability of a homestead from all invasion by legal process."

⁸⁰ *Sallee v. Waters, supra*; *Patten v. Smith*, 4 Conn. 450. 'But probably by a weight of authority, where there are several men employed in their use, they are not within the exemption. *Buckingham v. Billings*, 13 Mass. 82; *Spooner v. Fletcher*, 3 Vt. 133, 21 Am. Dec. 579; *Danforth v. Woodward*, 10 Pick. 423. See as to analogies, *Batchelder v. Shapleigh*, 10 Me. 135, 25 Am. Dec. 213; *Kilburn v. Demming*, 2 Vt. 404; *Ford v. Johnson*, 34 Barb. 364; *Meyer v. Meyer*, 23 Iowa, 375, 92 Am. Dec. 432.

justice has jurisdiction, then the justice shall certify the case to a superior court. The "jury" here mentioned was construed to mean not the jury called to try the case, though its ordinary meaning, but the "one or more credible, disinterested persons" to be sworn by the officer; for in construing statutes particular words ought not to be permitted to control the evident meaning of the context.⁸¹ The English statute of mortmain in terms forbade disposition of land to charities by other means than a deed executed a year before the grantor's death, and hence it was claimed, but without avail, that the statute did not apply to copyholds. "If it were perfectly clear," say the court, "that it was impossible for the mode of conveyance pointed out by the statute to be adopted in the case of copyhold, the only consequence that would follow would be that the statute would absolutely prohibit any conveyance of copyhold to charitable uses. But it would by no means be a legitimate consequence that copyhold lands could lawfully be conveyed without the formalities required by that act. The act was passed for the sake of public policy and to prevent persons from conveying their lands to charitable uses in a secret manner at or near to the time of their death." It was suggested by the court that, "admitting that there could not be an operative bargain and sale [in case of copyhold], still the parties might at least have attained the object of notoriety by executing a deed declaring the uses of the surrender in the mode required by the statute."⁸² In Maryland, in addition to the ordinary bonds of executors, a statute provided for a bond on the giving of which they were relieved from exhibiting any inventory or account. This bond was conditioned for paying all just debts of and claims against the deceased, and all damages which might be recovered against him as executor, and also all legacies bequeathed by the will.⁸³ All actions upon administration and testamentary bonds were required by the statute of limitations to be brought within

⁸¹ *Williams v. McDonal*, 3 Pin. 331.

⁸² *Doe v. Waterton*, 3 B. & Ald. 149.

⁸³ Act 1798, ch. 101, subch. 14, § 6.

twelve years after the giving of the said bonds and not after. It was held that the bond so provided for was a testamentary bond to which the limitation applied, though not provided for until after the enactment of the limitation law.⁸⁴

§ 600 (427). Another example of avoiding a positive statute upon grounds of equity is afforded by those cases in which courts of equity give effect to unwritten contracts relating to lands on the ground of part performance.⁸⁵ The great object of the statute of frauds is clearly expressed in the title prefixed to it. It is for the prevention of frauds and perjuries. It is not, therefore, to be presumed that it was intended in any instance to encourage fraud, and we may infer that any construction which would have a certain tendency to do so would counteract the design of the legislature by advancing the mischief intended to be prevented.⁸⁶ As the statute was intended to prevent frauds and perjuries, any agreement in which there was no danger of either has been held to be out of the statute;⁸⁷ or if within the statute, it is taken out when specific performance is necessary to prevent fraud, as in case of one party refusing to perform when the other had partly performed.⁸⁸

§ 601 (428). Statutes which are to be liberally construed will, like all others, be so construed as to exclude all cases which, though within the letter, are not within the mischief to be remedied, or the remedial or benign object in view, and therefore not within the intention of the law-maker. A statute enacting that any deed from a husband to a wife for her use shall be void as against his creditors, who were such at the time of execution, does not prevent a voluntary conveyance by the husband of a chattel which is

⁸⁴ *State v. Boyd*, 2 Gill & J. 365.

⁸⁵ 2 Story's Eq., § 752 et seq.; Reel v. Livingston, 34 Fla. 377, 16 So. 284, 43 Am. St. Rep. 202.

⁸⁶ *Wilber v. Paine*, 1 Ohio, 117; 2 Pomeroy's Eq., § 921.

⁸⁷ *Att'y-Gen'l v. Day*, 1 Ves. Sr. 221.

⁸⁸ *Bond v. Hopkins*, 1 Sch. & Lef. 483; *Wilson v. West Hartlepool Co.*, 2 De G., J. & S. 475; *Humphreys v. Green*, L. R. 10 Q. B. Div. 148; *Nunn v. Fabian*, L. R. 1 Ch. 35.

exempt from execution.⁸⁹ As this interpretative function, however, of excluding cases and applications which are not within the legislative intention is not peculiar to liberal construction, a few cases by way of farther illustration will suffice.⁹⁰ Municipal corporations, by reason of the purposes for which they are organized and for which they raise money and possess property, are excepted by implication from various statutes which apply to corporations generally. They are generally held not subject to garnishment.⁹¹ In some of the states, either by force of statutes which indicate the purpose to subject them to such process, or by the court's refusing to except the reasons operating elsewhere and thereon to accept them by implication, these corporations are liable, like natural persons and other corporations, to garnishment.⁹² The revenues of public corporations are the essential means by which they are enabled to perform their appointed work. Deprived of their regular and adequate supply of revenue, they are practically destroyed, and the very ends of their creation thwarted. It is

⁸⁹ *Smith v. Allen*, 39 Miss. 469.

⁹⁰ *Commercial Bank v. Foster*, 5 La. Ann. 516; *Ayers v. Knox*, 7 Mass. 306; *Green v. Commonwealth*, 12 Allen, 155; *Stockett v. Bird*, 18 Md. 484; *Electro-M. etc. Co. v. Van Auken*, 9 Colo. 204; *Covington v. McNickle*, 18 B. Mon. 262; *Wheeler v. McCormick*, 8 Blatchf. 267; *Maxwell v. Collins*, 8 Ind. 38; *Vane v. Vane*, L. R. 8 Ch. 383; *Union Canal Co. v. Young*, 1 Whart. 410, 30 Am. Dec. 212.

⁹¹ *Erie v. Knapp*, 29 Pa. St. 173; *Bulkley v. Eckert*, 3 Pa. St. 368, 45 Am. Dec. 650; *McLellan v. Young*, 54 Ga. 399; *Mobile v. Rowland*, 26 Ala. 498; *Hawthorn v. St. Louis*, 11 Mo. 59; *Pendleton v. Perkins*, 49 id. 565; *Fortune v. St. Louis*, 23 id. 239; *Hadley v. Peabody*, 13 Gray, 200;

Boone Co. v. Keck, 31 Ark. 387; *Stillman v. Isham*, 11 Conn. 123; *Derr v. Lubey*, 1 MacArthur, 187; *Bradley v. Richmond*, 6 Vt. 121; *Parsons v. McGavock*, 2 Tenn. Ch. 581; *Memphis v. Laskie*, 9 Heisk. 511, 24 Am. Rep. 327; *Burnham v. Fond du Lac*, 15 Wis. 193; *Buffham v. Racine*, 26 Wis. 449; *McDougal v. Hennepin Co.*, 4 Minn. 184; *Merwin v. Chicago*, 45 Ill. 133; *Greer v. Rowley*, 1 Pittsburgh, 1; *Mayor etc. v. Root*, 8 Md. 95; *Brown v. Gates*, 15 W. Va. 181.

⁹² *Adams v. Tyler*, 121 Mass. 380; *Whidden v. Drake*, 5 N. H. 13; *Bray v. Wallingford*, 20 Conn. 416; *Ward v. Hartford*, 12 Conn. 404; *Wilson v. Lewis*, 10 R. I. 285; *Wales v. Muscatine*, 4 Iowa, 302; *Drake on Att.* (5th ed.), § 516.

settled doctrine that the taxes and public revenues of such corporations cannot be seized under execution against them, either in the treasury or in transit to it.⁹³

§ 602 (429). The application of the words of a statute may be restrained to bring the operation of it within the intention of the legislature, when no violence is done by such interpretation to the language employed. On this principle the provision that no person shall be sued before any justice except in the township where he resides was held to have no application to a defendant who resided out of the state or in another county. The object of the statute was to prevent justices at the county seat of a county from engrossing the principal business at the expense of the justices of the other townships.⁹⁴ "An act concerning conveyances" provided that every partition of any tract of land or lot made under any order or decree of any court, and every judgment or decree by which the title to any tract of land or lot shall be recovered, shall be recorded; . . . and until so recorded, such partition, judgment or decree shall not be received in evidence in support of any right claimed by virtue thereof.⁹⁵ In an action of trespass to try title and for partition of land, a former unrecorded judgment was offered in evidence. It was held admissible; that this statute was only intended for the protection of *bona fide* purchasers and creditors; that it has no application when such judgment is offered in evidence in a second trial between the parties to the former suit in which it was rendered.⁹⁶

⁹³ Dillon on Municipal Corporations (2d ed.), §§ 9, 65, and cases cited; Chicago v. Hasley, 25 Ill. 595; Egerton v. Municipality, 1 La. Ann. 435; Municipality v. Hart, 6 id. 570; New Orleans, etc. R. R. Co. v. Municipality, 7 id. 148. See Smoot v. Hart, 33 Ala. 69; Newark v. Funk, 15 Ohio St. 462.

⁹⁴ Maxwell v. Collins, 8 Ind. 88;

Wheeler v. McCormick, 8 Blatchf. 267, Fed. Cas. No. 17,498.

⁹⁵ Pasc. Dig., art. 4710.

⁹⁶ Russell v. Farquhar, 55 Tex. 355. In this case Moore, C. J., said: "If courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they are couched, it might well be admitted

§ 603 (429). A statute of Virginia prohibited the sale of any office or deputation of any office touching the administration of justice, and contained a proviso that nothing in the act should be so construed as to prohibit the appoint-

that the appellant's objection to the evidence was well taken. But such is not the case. To be thus controlled, as has often been held, would be for the courts, in a blind effort to refrain from an interference with legislative authority by their failure to apply well-established rules of construction, to in fact abrogate their own power and usurp that of the legislature, and cause the law to be held directly the contrary of that which the legislature had in fact intended to enact. While it is for the legislature to make the law it is the duty of the courts to 'try out the right intendment' of statutes upon which they are called upon to pass, and by their proper construction to ascertain and enforce them according to their true intent. For it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertence or otherwise to express its intent, and to follow which would prevent that intent. In seeking to ascertain the intent of a statute, the words in which it is expressed should, and evidently must, receive our first as well as chief consideration. If, upon the perusal of a statute, its intent, and the means for carrying such intent into effect, plainly appear, and there is no apparent conflict between it and other seemingly unrepealed laws, it should be construed and enforced by the courts in conformity with the or-

inary signification of the words in which it is expressed, unless a necessity for otherwise construing it is made to appear. But if its mere perusal should not enable the court to satisfactorily interpret it, then it becomes the duty of the court to look diligently for the intention of the legislature, keeping in view at all times the old law, the evil and the remedy. R. S., art. 315, sec. 6. . . . The section in question forms a part of an act concerning conveyances. And when subsequently re-enacted, it is found in a law regulating and concerning registration. The evil in the legislative mind evidently was that, under existing laws, frauds might be perpetrated upon *bona fide* purchasers and creditors by persons who had previously parted with or been divested of their title to land, upon subsequent purchasers and creditors having no adequate evidence or information of such previous divestiture of title. By the old law the bringing of suit charged all the world with notice *lis pendens* of the matters then in litigation. But this notice ceased with the termination of the case: and, therefore, conveyances by judgment or decree of court were within the same evil as existed in regard to transfers between parties prior to the registration laws. Hence it was essential that they should be subjected to the same rule. Public convenience also de-

ment, qualification and acting of any deputy clerk or deputy sheriff who shall be employed to assist the principals in the execution of the duties of their respective offices.⁹⁷ The question arose on that statute whether a contract was legal by which a sheriff agreed that another should perform the duties of his office, and have all the fees, privileges and emoluments of it, and in consideration thereof should pay to the sheriff a gross sum, unconnected in any manner with the fees of the office. The court declared that it was settled by numerous authorities that, where the reservation or agreement is not to pay *out of the profits*, but to pay generally a certain sum, which must be paid at all events, this is a sale of the office; and a bond for the performance of such an agreement is void by the statute.⁹⁸ It apparently adopts the view of Willis, C. J., in *Layng v. Paine*, as to the principal reasons for making the statute: (1) that offices might be exercised by persons of skill and integrity, and (2) that they might take only the legal fees. The proviso, and the history of the office — it having been immemorially farmed out,—induced the court to hold that the contract in question was not prohibited. A statute which inhibited a party as witness testifying as to any transaction with or statement by a deceased party was held not to extend to conversations with a surviving partner of the deceased, though the testimony might result in establishing a contract

manded that there should be one office in each county where those desiring to do so could inform themselves as to the transfers or incumbrances affecting all the real estate in the county. But if any one failed to have his transfer registered, certainly only those who are in some way injured thereby had a right to complain, or to insist that another had lost some valuable or vested right by his failure to comply with the law." *Crosby v. Huston*, 1 Tex. 237.

⁹⁷ 1 Rev. Code of 1819, ch. 145, p. 559.

⁹⁸ *Salling v. McKinney*, 1 Leigh, 42, citing *Ingram's Case*, Co. Lit. 234a; *Trevor's Case*, Cro. Jac. 269; 12 Coke, 369; *Woodward v. Foxe*, 3 Lev. 289; 2 Vent. 187; 3 Inst. 148; *Layng v. Paine*, Willes' Rep. 571; *Parsons v. Thompson*, 1 H. Bl. 322; *Garforth v. Fearon*, id. 327; *Law v. Law*, Cas. Temp. Talb. 140; 3 P. Wms. 391; *Harrington v. Du Châtel*, 1 Bro. C. C. 124; *Noel v. Fisher*, 3 Call, 215.

with the firm.⁹⁹ A New Jersey statute makes void and of no effect any warrant of attorney for confessing judgment which shall be included in the body of any bond, bill or other instrument for the payment of money.¹ This provision was contained in an act which when passed was entitled "An act to regulate the practice of the courts of law." It was therefore held that it was a mere regulation of the practice in the courts of that state, and did not prohibit the making therein of such warrants of attorney for use in other states in the form that may be legal in their courts.² "Laws," by construction, have been narrowed to mean only written laws, as in the application of that provision of the thirty-fourth section of the judiciary act of 1789, that "the laws of the several states, except when the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases where they apply."³

§ 604 (429). In *Holmes v. Paris*⁴ the statute required a notice to a surveyor, or some municipal officer, of a defect in a highway, for a period not less than twenty-four hours prior to an accident, to render the town liable. But if the defect was caused by the surveyor while acting as a servant of the town, the notice was not necessary. The court say: "We incline to the opinion that the statute does not apply to a case such as this. In its literal terms, it does; in its purpose and intent, it does not. This particular provision of the statute was intended for another class of cases. Its purpose is to allow a town a reasonable opportunity to remove a defect after receiving information of its existence. Notice of a fact to a person who already knows the fact cannot be

⁹⁹ *Bennett v. Frary*, 55 Tex. 145; 546, 21 L. Ed. 757; *Supervisors v. Whart. Ev.*, § 469. *Schenck*, 5 Wall. 772, 11 L. Ed. 556;

¹ Rev. of 1877, p. 81, § 1.

² *Hendrickson v. Fries*, 45 N. J. L. 555.

³ *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Boyce v. Tabb*, 18 Wall.

Watson v. Tarpley, 18 How. 517, 15 L. Ed. 509; *Delmas v. Ins. Co.*, 14 Wall. 665, 20 L. Ed. 757.

⁴ 75 Ma. 559.

useful. . . . Statutes are often in some respects literally deficient by reason of their generality. They are necessarily expressed in general terms. All cases that may arise under them cannot be anticipated. Therefore there must be some flexibility in their interpretation and application to facts. There must be some power and discretion in the courts to consider probable purposes, motives and results." The object of an act was to provide for the disposition of public property and not to interfere with the location of streets; it was therefore held that the designation therein of one of the boundaries of that property as the "eastern line of E street to its point of intersection with the northern line of J street," was not intended, and did not operate to extend E street northward to J.⁵ A statute against gaming was that, "if any person shall lose to another," he might receive it back. This was held not applicable to one who sets up or is interested in setting up a faro bank, and loses money to those who bet against the bank.⁶ "When the evil," say the court, "which led to the passage of the act is considered, it is evident that the legislature did not intend to embrace within its protection those who engage in gaming by means of contrivances which are only used by those who make gaming a business."⁷ A statute of Indiana required an official bond to be signed and acknowledged by the principal and his sureties in the presence of the county commissioners. The question arose whether a bond not so acknowledged was valid. The requirement was held directory. It had been decided that the surety of an officer executing an official bond upon the faith of a promise by the principal that it would be executed by another as surety, and allowing the principal to have the custody of the bond, would be discharged if the bond were tendered by the principal, and in good faith accepted, without being executed by that other. It was merely to remedy the mischiefs to the public which

⁵ *Burr v. Dana*, 22 Cal. 11, 20;
Jacobs v. Kruger, 19 id. 411.

⁶ *Brown v. Thompson*, 14 Bush,
538.

⁷ *Id.*

were apprehended in consequence of the law as thus declared, and such as might ensue from the forgery of sureties' names, that the statute in question was enacted. That mischief was the loss of public money by sureties of officers avoiding liability as such upon official bonds. The remedy was not, certainly, to devise additional methods by which liability might be avoided, but to close for the future the door of escape already existing, or supposed to exist; not to relieve persons becoming sureties of county treasurers, but to protect the people from the defalcations of those officers. It was not for the benefit of the surety that he was required in person to acknowledge the bond before the commissioners, but it was to prevent him from afterwards making any question concerning the genuineness of his signature, or the validity of the instrument as against him.⁸

§ 605 (430). *Causus omissus*.—Liberal construction is given to suppress the mischief and advance the remedy. For this purpose, as has already been said, it is a settled rule to extend the remedy as far as the words will admit, that everything may be done in virtue of the statute in advancement of the remedy that can be done consistently with any construction.⁹ Where its words are plain and clearly define its scope and limit, construction cannot extend it; or where the language is so explicit as to exclude any reasonable inference that such extension was intended. Lord Brougham said: "If we depart from the plain and obvious meaning, we do not in truth construe the act, but alter it. We supply a defect which the legislature could easily have supplied, and are making

⁸ *State v. Blair*, 32 Ind. 313. The following cases contain implied exceptions for not being within the intention of the statute: *Simpson v. Unwin*, 3 B. & Ad. 134; *Ramsden v. Gibbs*, 1 B. & C. 319; *Hearne v. Garton*, 2 E. & E. 66; *Aberdare Local Board v. Hammett*, L. R. 10 Q. B. 162; *Core v. James*, L. R. 7 Q. B.

135; *Reg. v. Sleep*, L. & C. 44; *Reg. v. Dean*, 12 M. & W. 39; *Lee v. Simpson*, 3 C. B. 871; *Reg. v. Harvey*, L. R. 1 C. C. R. 284; *Edward v. Trevellick*, 4 E. & B. 59.

⁹ *Turtle v. Hartwell*, 6 T. R. at p. 429; *Atcheson v. Everitt*, 1 Cowp. at p. 391.

the law, not interpreting it.”¹⁰ “We are bound,” said Buller, J., “to take the act of parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make law.”¹¹ It will make no difference if it appears that the omission on the part of the legislature was a mere oversight, and that without doubt the act would have been drawn otherwise had the attention of the legislature been directed to the oversight at the time the act was under discussion.¹² When the language is general or obscure the court must construe it, and, as far as it can, make it available for carrying out the objects of the legislature and for doing justice between parties.¹³

§ 606 (431). It will be seen by the foregoing illustrations of liberal construction that where language has received an expansive construction it has been to effect the intention of the law-maker, not to give the statute an effect beyond the intention or to supply the defects of the statute. It results from the judicial function of expounding the law as it is that the courts cannot extend it to meet a case which has clearly and undoubtedly been omitted to be provided for.¹⁴ As the judicial committee said in *Crawford v. Spooner*,¹⁵ “We cannot aid the legislature’s defective phrasing of an act; we cannot add and mend, and, by construction, make up deficiencies which are left there;” in other words, the language of statutes, but more especially of modern acts,¹⁶ must neither be extended beyond its natural and proper meaning, in order to supply defects, nor strained to meet the justice of an individual case.”¹⁷ If the language is plain,

¹⁰ *Gwynne v. Burnell*, 7 Cl. & F. 696.

¹¹ *Jones v. Smart*, 1 T. R. 44.

¹² *Hardc. on St.* 21; *Lane v. Bennett*, 1 M. & W. 70; *N. E. Ry. v. Leadgate*, L. R. 5 Q. B. 161; *Fort v. State*, 92 Ga. 8, 18 S. E. 14, 23 L. R. A. 86; *State v. Simon*, 20 Ore. 365, 26 Pac. 170; *In re School Directors*, 5 Pa. Dist. Ct. 750.

¹³ *Phillips v. Phillips*, L. R. 1 P. & D. 173.

¹⁴ *Hardc. on St.* 20.

¹⁵ 6 Moore’s P. C. 9.

¹⁶ Lord Brougham in *Gwynne v. Burnell*, 7 Cl. & F. at p. 696; Lord Selborne in *Pinkerton v. Easton*, L. R. 16 Eq. at p. 492.

¹⁷ *Hardc. on Stats.* 20, 21; *Mills v. La Verne Land Co.*, 97 Cal. 254, 32

precise and unambiguous, there is no room for construction; and the particular intention so expressed is alone to be carried into effect. Though statutes are to be construed with reference to the evil they were designed to suppress, this rule does not apply to include cases not embraced in the language employed or fairly implied, though such cases involve the same mischief.¹⁸ "While the courts may interpret doubtful or obscure phrases and imperfect language in a statute so as to give effect to the presumed intention of the legislature, and to carry out what appears to be the general policy of the law, they cannot, by construction, cure a *casus omissus*, however just and desirable it may be to supply the omitted provision."¹⁹

§ 607 (431). A statute of Connecticut which validated deeds executed and acknowledged in any other state "in conformity with the laws of such state" was held not to apply to a deed of land situated in that state, executed in New York and acknowledged before a Connecticut commissioner, defective by the laws of Connecticut, if executed there, for having but one witness.²⁰ In order to extend a statute by equitable construction beyond its letter, it must be collected from the act that the wrong sought to be redressed was one of the considerations for passing it; otherwise it is a *casus omissus* which a court of law cannot supply. Where an act denies to one class of suitors a remedy or defense which others enjoy, it will not be extended by equitable construction to cases not specified in it, unless the court is satisfied the case is within the mischief or occasion that was in the

Pac. 169; *Fort v. State*, 92 Ga. 8, 18 L. R. A. 86; *Springside Coal Min. Co. v. Grogan*, 53 Ill. App. 60; *State v. Plazza*, 66 Miss. 426, 6 So. 316; *Broadfoot v. Fayetteville*, 128 N. C. 529, 39 S. E. 20; *Richardson v. Norfolk & W. Ry. Co.*, 37 W. Va. 641, 17 S. E. 195; *Lord Denman in Green v. Wood*, 7 Q. B. at p. 185; *Whiteley v. Chappell*, L. R. 4 Q. B. 147.
¹⁸ *United States v. Chase*, 135 U. S. 255, 10 S. C. Rep. 756, 34 L. Ed. 117.
¹⁹ *McKuskie v. Hendrickson*, 128 N. Y. 555, 28 N. E. 650.
²⁰ *Farrell Foundry v. Dart*, 26 Conn. 376.

mind of the legislature at the time of its passage.²¹ A statute in Maine provided that "hereafter when any woman possessed of property, real or personal, shall marry, such property shall continue to her notwithstanding her coverture, and she shall have, hold and possess the same as her separate property, exempt from any liability for the debts or contracts of her husband." It was held that under this statute she could not make sales and purchases of property. The court, by Shepley, J., said: "It was the intention of the legislature, as the title of the act declares, to secure to married women their rights in property, and it should receive such a construction as will make that intention effectual, so far as it can be done consistently with the established rules of law. But courts of justice can give effect to legislative enactments only to the extent to which they may be made operative by a fair and liberal construction of the language used. It is not their province to supply defective enactments by an attempt to carry out fully the purposes which may be supposed to have occasioned those enactments. This would be an assumption by the judicial of the duties of the legislative department."²²

§ 608 (432). An act which authorizes a municipal body to open and widen streets according to the procedure therein prescribed, and omits to prescribe a procedure for cases of widening streets, is to that extent inoperative.²³ A statute providing for testing the accuracy of the weights and measures used in selling commodities, imposing penalties on those who use them contrary to the act in selling, is not applicable to persons engaged in buying.²⁴ The heir at common law inherits except in the particular cases in which the statutes of descent provide for a different disposition of

²¹ Scaggs v. Baltimore, etc. R. R. Co., 10 Md. 268; Jones v. Smart, 1 T. R. 52; Hull v. Hull, 2 Strob. Eq. 174; Moore v. Indianapolis, 120 Ind. 483, 22 N. E. 424.

²² Swift v. Luce, 27 Me. 285.

²³ Chaffee's Appeal, 56 Mich. 244, 23 N. W. 871.

²⁴ Southwestern R. R. Co. v. Cohen, 49 Ga. 627.

property,²⁵ and by construction a court cannot extend such statutes to any other cases.²⁶ An officer having authority in his county to take proof or acknowledgment of all instruments in writing conveying land therein was empowered by a later statute to take acknowledgment of deeds for lands in any part of the state; and it was held that his power to receive proof of instruments was not thereby enlarged.²⁷ There may be no apparent reason why an enactment is confined to one of several things, which might for a similar or for precisely the same reason be provided for; yet, if such enactment is free from ambiguity and uncertainty, the courts cannot extend it.²⁸ A divorce act provided that any order made for the protection of a married woman in respect of her earnings might be discharged by the magistrate who made it; it was held that this power could not be exercised by his successor.²⁹ An act authorized a specified and limited number of banking companies in each of twelve districts, five of which were authorized in H. county; it also provided that the number of such banking companies authorized to be formed and to engage in business in H. county should not exceed four; and the full number having organized, and in good faith engaged in business, it was held that the powers in this respect authorized by the statute were exhausted; that in case of the failure or surrender of the franchise by some of such companies, the statute gave no authority for the organization of new and additional companies to take the place of the defunct ones.³⁰

§ 609 (433). A general act providing for the organization of companies for the manufacture and supply of gas was held not to authorize the creation of a corporation for the purpose of supplying "natural gas" to consumers.³¹ In the

²⁵ *Johnson v. Haines*, 4 Dall. 64.

²⁶ *Cresoe v. Laidley*, 2 Binn. 279.

²⁷ *Peters v. Condron*, 2 S. & R. 80.

²⁸ *Smith v. Rines*, 2 Sumn. 354;

Swift v. Luce, 27 Me. 285.

²⁹ *Reg. v. Arnold*, 5 B. & S. 322; *Sharp*, Ex parte, 10 Jur. (N. S.) 1018.

³⁰ *State v. Chase*, Governor, 5 Ohio St. 528.

³¹ *Emerson v. Commonwealth*, 108 Pa. St. 111.

judicial argument to this result the court said: "The judicial power of the government may sometimes impute a legislative intent not expressed with perfect clearness, where the words used import such intent, either necessarily or by a plain and manifest implication. But it would be a dangerous excess of judicial authority, not to be justified by any considerations, for a court to declare a law by the imputation of intent when the words used do not import it, either necessarily or by plain implication, and when all the surroundings of the enactment clearly evince that the construction claimed could not have been within the legislative thought." By a statute an inspector was authorized at all reasonable times to enter any shop, and "there to examine all weights, measures, steelyards or other weighing machines;" "and if upon such examination it shall appear that the said weights and measures are light or otherwise unjust, the same shall be liable to be seized and forfeited."³² It was held that this statute gave no power to seize and forfeit a weighing machine.³³

³² 5 and 6 W. 4, ch. 63, § 28.

³³ *Thomas v. Stephenson*, 2 E. & B. 108.

CHAPTER XVI.

DIRECTORY AND MANDATORY STATUTES.

§ 610 (446). Preliminary explanation of directory and mandatory statutes.—The consequential distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while a failure to comply with the requirements of the other is productive of serious results. This distinction grows out of a fundamental difference in the nature, importance and relation to the legislative purpose of the statutes so classified. The statutory provisions which may thus be departed from with impunity without affecting the validity of statutory proceedings are usually those which relate to the mode or time of doing that which is essential to effect the aim and purpose of the legislature or some incident of the essential act.¹ Directory provisions are not intended by the legislature to be disregarded; but where the consequences of not obeying them in every particular are not prescribed, the courts must judicially determine them. In doing so they must necessarily consider the importance of the punctilious observance of the provision in question to the object the legislature had in view. If it be essential it is mandatory, and a departure from it is fatal to any proceeding to execute the statute or to obtain the benefit of it.

§ 611 (447). Whether statute directory or mandatory — General considerations.—There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. Where the provision is in affirmative words, and there are no negative words, and it relates to the time or manner of doing

¹ *McKune v. Weller*, 11 Cal. 49.

the acts which constitute the chief purpose of the law, or those incidental or subsidiary thereto, by an official person, the provision has been usually treated as directory.² Generally, it is so; but it is a question of intention.³ Where a statute is affirmative it does not necessarily imply that the mode or time mentioned in it is exclusive, and that the act provided for, if done at a different time or in a different manner, will not have effect. Such is the literal implication, it is true; but since the letter may be modified to give effect to the intention, that implication is often prevented by another implication, namely, that the legislature intends what is reasonable, and especially that the act shall have effect; that its purpose shall not be thwarted by any trivial omission, or a departure from it in some formal, incidental or comparatively unimportant particular. "It would not, perhaps, be easy," says Sharswood, J., "to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory or imperative. Where the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may be and often have been construed to be directory; but negative words which go to the power or jurisdiction have never, that I am aware of, been brought within the category."⁴ "It is the duty of courts of justice," said Lord Campbell, "to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."⁵ Lord Penzance said: "I have been carefully through all the principal cases, but, upon reading them all, the conclusion at which I am constrained to arrive is this: that you cannot glean a

² In re Petition of Douglass, 58 Barb. 174; Att'y-Gen'l v. Baker, 9 Rich. Eq. 521; State v. Harris, 17 Ohio St. 608; Bladen v. Philadelphia, 60 Pa. St. 464.

³ Kellogg v. Page, 44 Vt. 356, 8 Am. Rep. 383.

⁴ Bladen v. Philadelphia, 60 Pa. St. 464, 466.

⁵ Liverpool Bank v. Turner, 30 L. J. Ch. 380.

great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of the *Liverpool Bank v. Turner*." He had said in the same judgment, "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or directory."⁶ In *Upshur v. Baltimore City* the court says: "The whole surroundings, the purposes of the enactment, the ends to be accomplished, the consequences that may result from one meaning rather than another, and the cardinal rule that seemingly incongruous provisions shall be made to harmonize rather than conflict, must all be considered in determining whether particular words shall have a mandatory or directory effect ascribed to them."⁷ Unless a fair consideration of a statute, directing the mode of proceeding of public officers, shows that the legislature intended compliance with the provision in relation thereto to be essential to the validity of the proceeding, it is to be regarded as directory merely.⁸ Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute.⁹

⁶ *Howard v. Bodington*, L. R. 2 P. Div. 211.

⁸ *Jones v. State*, 1 Kan. 273.

⁷ *Upshur v. Baltimore City*, 94 Md. 743, 51 Atl. 953.

⁹ *Neal v. Burrows*, 34 Ark. 491;
Mount v. Kesterson, 6 Cold. 452;
Cheatham v. Brien, 3 Head, 552;

§ 612 (448). Provisions directory as to time.—Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards.¹⁰ In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer.¹¹ And it was accord-

Atkinson v. Rhea, 7 Humph. 59; Sellers v. Fite, 3 Baxt. 131; In re Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380.

¹⁰ Wilson v. State Bank, 3 La. Ann. 196.

¹¹ People v. Allen, 6 Wend. 486; Jackson v. Young, 5 Cow. 269, 15 Am. Dec. 453; Heath, Ex parte, 3 Hill, 42; Walker v. Chapman, 22 Ala. 116; Charter v. Greame, 13 Q. B. 216; Reg. v. Mayor, etc., 7 E. & B. 910; Reg. v. Ingall, L. R. 2 Q. B. Div. 199; Doe d. Phillips v. Evans, 1 Cr. & M. 450; Rex v. Denbyshire, 4 East, 142; Pond v. Negus, 3 Mass. 230, 3 Am. Dec. 131; Wheeler v. Chicago, 24 Ill. 105, 74 Am. Dec. 736; Torrey v. Millbury, 21 Pick. 64; Colt v. Eves, 12 Conn. 243; People v. Cook, 14 Barb. 259; Wright v. Sperry, 21 Wis. 331; State v. Click, 2 Ala. 26; Limestone Co. v. Rather, 48 Ala. 433; St. Louis Co. Ct. v. Sparks, 10 Mo. 117; Leé v. State, 49 Ala. 43; Hugg v. Camden, 39 N. J. L. 620; Eustis v. Kidder, 26 Me. 97; Lackawana Iron Co. v. Little Wolf, 38 Wis. 152; Rex v. Leicester, 7 B. & C. 6; Bosanquet v. Woodford, 5

Q. B. 310; Rex v. Sparrow, 2 Str. 1123; Childs v. State, 97 Ala. 49, 12 So. 441; Standard v. Village of Industry, 55 Ill. App. 523; Anderson v. Mayfield, 93 Ky. 230, 19 S. W. 598; Durand v. Gage, 76 Mich. 624, 43 N. W. 533; Snyder v. Circuit Judge, 80 Mich. 511, 45 N. W. 596; State v. West Duluth Land Co., 75 Minn. 456, 71 N. W. 115; State v. St. Paul Trust Co., 76 Minn. 423, 79 N. W. 543; State v. Hannibal, etc. Ry. Co., 113 Mo. 297, 21 S. W. 14; State v. Ringo, 42 Mo. App. 115; Smith v. Swain, 71 N. H. 277, 52 Atl. 857; Albright v. Sussex County Lake & Park Commission, 68 N. J. L. 523, 53 Atl. 612; Matter of Hennessey, 164 N. Y. 393, 58 N. E. 446; Thomson v. Harris, 38 Hun, 478, 34 N. Y. S. 885; Greer v. Asheville, 114 N. C. 678, 19 S. E. 635; Pickton v. Fargo, 10 N. D. 469, 88 N. W. 90; James v. West, 67 Ohio St. 28, 65 N. E. 156; Commonwealth v. Painter, 1 Pa. Dist. Ct. 393; Worth Street, 18 Pa. Co. Ct. 49; Allen v. Allen, 114 Wis. 615, 91 N. W. 218; State v. Bolln, 10 Wyo. 439, 70 Pac. 1.

ingly held that a brigade order, constituting a court-martial, issued in July, when by the militia law it was made the duty of the commandant of the brigade to issue such order on or before the 1st day of June in every year, was valid.¹² A provision that an appeal bond be executed before an appeal is perfected, when not a part of the essential steps to take an appeal, is directory.¹³ So is a provision that an officer shall take his official oath within a certain period,¹⁴ or give his official bond,¹⁵ even where the issue of a commission to him is prohibited until such bond is given;¹⁶ for it would be attended with mischievous consequences if in such cases all the official acts of such delinquent were held void. His acts, if he in fact filled the office, would doubtless be valid. There could be no collateral inquiries affecting the right of a *de facto* officer to act. A statute which provides that commissioners to locate a county seat shall meet at a time and place provided for, that a majority shall constitute a quorum to do business, "and that the commissioners may adjourn to some other place or time, and may adjourn from time to time until the business before them may be completed," is directory merely, and the commissioners have the power to elect a chairman and empower him to fix the time of the next meeting.¹⁷

§ 613. A statute required the township clerk to certify on or before the first Monday of October in each year to the supervisor of his township the amount of the town indebtedness growing out of the payment of bounties. Where

¹² *People v. Allen*, 6 Wend. 486.

¹³ *McCarver v. Jenkins*, 2 Heisk. 629.

¹⁴ *Howland v. Luce*, 16 John. 135.

¹⁵ *Boykin v. State*, 50 Miss. 375;
People v. Holley, 12 Wend. 481;
Pryor v. Rochester, 57 App. Div. 486, 69 N. Y. S. 86. In *Flatan v. State*, 56 Tex. 94, it was held that the statute requiring a party elected to office to qualify within a

prescribed period of time will be construed as directory only in a case where, from reasons beyond his control, he cannot qualify within the time allowed; but such construction will not be given in a case of neglect or refusal to qualify.

¹⁶ *McBee v. Hoke*, 2 Speers, 138.

¹⁷ *Edwards v. Hall*, 30 Ark. 31.

such certificate was not made within that period, but was within a week afterwards, and seasonably to answer the intended purpose, it was held good, and the provision so far directory. The information was to enable the supervisor to include the amount certified in the tax levy.¹⁸ The assessors of a school district were directed by a statute to assess the district tax within thirty days after the clerk had certified the vote for raising the tax, and it was held to be merely directory, as there were no negative words in the statute limiting their power to make the assessment afterwards.¹⁹ If a statute direct a tax to be levied at a given time and it is omitted, it may be levied at a different time.²⁰ The following statutes relating to taxes were held directory as to time: A statute requiring county treasurers, immediately after a tax sale, to deposit in the office of the county clerk a statement containing a description of the property sold, the names of the purchaser and owner and the amount of the sale;²¹ a provision that school district clerks shall deliver to the selectmen of the town an attested copy of every vote of the district to raise money within ten days after the meeting at which the vote was taken;²² a requirement that county treasurers should make the delinquent tax list on the first day of April and should immediately certify it to the clerk of the district court;²³ a provision requiring the tax levy to be certified to the county auditors by October 1st.²⁴

¹⁸ *Smith v. Crittenden*, 16 Mich. 152.

¹⁹ *Pond v. Negus*, 3 Mass. 230, 3 Am. Dec. 131.

²⁰ *State v. Harris*, 17 Ohio St. 608; *State v. Horner*, 34 Md. 569; *State v. Co. Com'rs*, 29 id. 516; *Tuohy v. Chase*, 30 Cal. 524; *Shaw v. Orr*, 30 Iowa, 355; *People v. Lake Co.*, 33 Cal. 487; *People v. Rochester*, 5 Lans. 11; *Corbet v. Bradley*, 7 Nev. 106; *Looney v. Hughes*, 30 Barb. 605; *Gale v. Mead*, 2 Denio, 160;

Pond v. Negus, 3 Mass. 230, 3 Am. Dec. 131; *Anderson v. Mayfield*, 93 Ky. 230, 19 S. W. 598; *State v. Hannibal, etc. Ry. Co.*, 113 Mo. 297, 21 S. W. 14.

²¹ *Allen v. Allen*, 114 Wis. 615, 91 N. W. 218.

²² *Smith v. Swain*, 71 N. H. 277, 52 Atl. 857.

²³ *State v. St. Paul Trust Co.*, 76 Minn. 423, 79 N. W. 543.

²⁴ *State v. West Duluth Land Co.*, 75 Minn. 456, 71 N. W. 115.

§ 614. A statute required ward inspectors of a city to certify the result of the ward elections on the day subsequent to the closing of the polls, or sooner. It was held that their certificate was valid although it was not made till the second day after the closing of the polls.²⁵ The statutory requirement that the polls of election be closed at sunset has been held to be directory.²⁶ A certificate was required to be made out immediately, and though one was made seven months afterwards it was received in evidence, and the election held good.²⁷ A provision of an election law that an order of court reviewing the determination and acts of the officers with whom certificates of nomination are required to be filed must be made on or before the last day fixed for filing certificates of nomination to fill vacancies, which was fifteen days before election, was held to be directory.²⁸ A statute requiring the county clerk to cast up the vote within fifteen days after election is directory as to time and the duty continues until performed.²⁹ An act which authorized the acquisition of fresh-water lakes and lands adjoining, for public use, provided that it should apply only to counties which adopted the act, at the next election at which local officers were elected, and made it the duty of the county clerk to give notice of the election for the adoption of the act and to prepare and distribute the necessary ballots. The provision as to the time of submission was held to be directory, and a submission at a subsequent election was held valid.³⁰

§ 615 (449). The provision of the statute requiring that grand jurors should "be summoned at least five days before the first day of the court" to which they may be summoned is manifestly merely directory to the sheriff and for the

²⁵ *Heath, Ex parte*, 3 Hill, 42.

²⁶ *Matter of Hennessey*, 164 N. Y.

²⁷ *Holland v. Davies*, 36 Ark. 446; 393, 58 N. E. 446.

²⁸ *Sweepston v. Barton*, 39 id. 549; *Fry*

²⁹ *State v. Ringo*, 42 Mo. App. 115.

³⁰ *Booth*, 19 Ohio St. 25.

³¹ *Albright v. Sussex County*

³² *People v. Peck*, 11 Wend. 604.

Lake & Park Commission, 68 N. J. L. 523, 53 Atl. 612.

convenience of the jurors, that they may have sufficient notice of the service required of them. And though it may be true that a juror could not be compelled to attend unless so summoned, yet if he thinks proper to attend and serve without such notice, it constitutes no objection to the regular organization of the grand jury. The time of summoning jurors, except so far as their own convenience is concerned, is quite an immaterial thing which could in no wise affect their official acts.³¹ And so of other departures from the letter of statutes relating to obtaining jurors.³² It is so of the requirement that defendant in replevin be summoned to appear at the next term.³³ The provision requiring a judge who tries a cause without a jury to give his decision on or before the first day of the next term is directory. It imposes a duty upon the judge; but as the parties have no control over his action, it would be a harsh construction which should deprive them of the fruits of the litigation because the judge fails to decide by a particular day.³⁴ So of the requirement that the officer before whom proceedings are had against an absconding, concealed or non-resident debtor shall make his report within twenty days after the appointment of trustees, and that the latter cause their appointment to be recorded within thirty days.³⁵ The omission of a justice of the peace to file his return to an appeal within the time required by law is not fatal. The appellate court will have jurisdiction of the case if the return is made after the time so prescribed.³⁶ A statute requiring a court, on the first day of a term, to assign cases for trial on particular days, was held directory.³⁷ So of a statute requiring courts, referees and masters to determine and adjudicate all

³¹ *Johnson v. State*, 33 Miss. 363.

³² *State v. Carney*, 20 Iowa, 82; *State v. Pitts*, 58 Mo. 556; *State v. Gillick*, 7 Iowa, 287; *State v. Smith*, 67 Me. 328; *Huecke v. Milwaukee City Ry. Co.*, 69 Wis. 401, 34 N. W. 243; *Birchard v. Booth*, 4 Wis. 67.

³³ *Johnson*, *Ex parte*, 7 Cow. 424.

³⁴ *Rawson v. Parsons*, 6 Mich. 401; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Fraser v. Willey*, 2 Fla. 116.

³⁵ *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62.

³⁶ *Kellogg*, *Ex parte*, 3 Cow. 372.

³⁷ *People v. Doe*, 1 Mich. 451.

cases within ninety days after final submission.³⁸ An act requiring the report of viewers in road cases to be filed within six months was held directory.³⁹

§ 616. A statute specified a time for trustees to make a sale of trust property; this was held directory, and that a sale made afterwards was good and passed the title.⁴⁰ The time mentioned by statute within which swamp lands granted by congress to Oregon should be selected was held not imperative, there being no limitation of the power of the selecting officer.⁴¹ The following statutory provisions were held directory as to time: Requiring a will devising lands to be recorded in the county where the lands are situated within six months after probate of the will;⁴² requiring banks to publish a statement of assets and liabilities in January and July of each year and providing that they cannot maintain an action until compliance;⁴³ providing for the appointment of prison inspectors in the month of November in each year, who are required to enter on the discharge of their duties on the first Monday of January following their appointment;⁴⁴ requiring the aldermen of a city to appoint a marshal at the first meeting after their qualification;⁴⁵ a provision requiring penal ordinances to be published within thirty days after their passage and providing that the same should not take effect until ten days after their publication;⁴⁶ a requirement that a city council, upon letting a contract for a local improvement, should proceed forthwith to appoint a special assessment committee.⁴⁷ An act provided that in case of an appeal from the probate to the circuit

³⁸ *James v. West*, 67 Ohio St. 28, 65 N. E. 156. *ica v. Madison*, 99 Cal. 125, 33 Pac. 762.

³⁹ *Worth Street*, 18 Pa. Co. Ct. 49. ⁴⁴ *Commonwealth v. Painter*, 1

⁴⁰ *Savage v. Walshe*, 26 Ala. 619, 631. Pa. Dist. Ct. 393.

⁴¹ *Gaston v. Stott*, 5 Ore. 48. ⁴⁵ *Greer v. Asheville*, 114 N. C.

⁴² *Wolf v. Brown*, 142 Mo. 612, 44 S. W. 733. 678, 19 S. E. 635. ⁴⁶ *Standard v. Village of Indus-*

⁴³ *Bank of British North Amer-* *try*, 55 Ill. App. 523. ⁴⁷ *Pickton v. Fargo*, 10 N. D. 469,

88 N. W. 90.

court, the transcript and proof of notice should be filed at or before the next term of the circuit court. The provision was held directory as to the time of filing.⁴⁸ Afterwards the act was amended so as to require the transcript and proof of notice to be filed within thirty days or the appeal to be dismissed. In view of other statutory provisions bearing on the question the provision was held to be still directory and the filing was held to be in time, provided it was before a motion to dismiss the appeal.⁴⁹

§ 617. **Time provisions held mandatory.**—Where a special act was passed in relation to the presentation of certain claims, otherwise not allowable, and requiring them to be presented within thirty days, and, therefore, made a distinction between such claims and ordinary ones as to the time of presentment, it was held mandatory; that the presumption was that such limitation as to time was material to be followed.⁵⁰ A statute requiring claims to be filed within a specified time in case of assignments was held mandatory.⁵¹ So of a statute requiring a motion for a new trial to be filed within four days after verdict.⁵² So of provisions requiring certain acts to be done within a specified time in order to secure or perfect an appeal.⁵³ A provision requiring an assessment of benefits to be completed and confirmed by the board of public works within four months after receiving a certified copy of the order of a park board taking certain property for park purposes was held to be mandatory for the reason that it was for the benefit of property owners, who were compelled to watch the proceedings of the board in order to protect their rights.⁵⁴ A statute required that, within

⁴⁸ *Durand v. Gage*, 76 Mich. 624, 43 N. W. 583.

⁴⁹ *Snyder v. Circuit Judge*, 80 Mich. 511, 45 N. W. 596. See on the same statute, *Merriman v. Peck*, 95 Mich. 277, 54 N. W. 871.

⁵⁰ *Corbett v. Bradley*, 7 Nev. 106.

⁵¹ *Nichols v. Cass*, 65 N. H. 212, 23 Atl. 430.

⁵² *Saxton National Bank v. Bennett*, 138 Mo. 494, 40 S. W. 97.

⁵³ *Merriman v. Peck*, 95 Mich. 277, 54 N. W. 871; *Marcotte v. Fitzgerald*, 45 Minn. 51, 47 N. W. 316.

⁵⁴ *State v. District Court*, 75 Minn. 292, 77 N. W. 968.

fifteen days after a vote to organize a new school district, directors of the new district should be elected. The provision was held mandatory as to time, and a failure to elect directors within the time specified was held to nullify the prior proceedings to organize the district.⁵⁵ An act provided that, on the petition of ten legal voters asking that a certain question be submitted to vote, the county judge should, at the next regular term of his court, make an order for the election. The act was held mandatory as to the time of making the order, and an order made at the same term at which the petition was presented was held void.⁵⁶

§ 618 (451). Formal and incidental requirements directory.—Statutes directing the mode of proceeding by public officers are directory, and are not to be regarded as essential to the validity of the proceedings themselves unless so declared in the statutes.⁵⁷ In *People v. Cooke*⁵⁸ the court say: "Statutes directing the mode of proceeding of public officers are directory, and are not to be regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute." The qualification further on in the opinion is: "Unless there is something in the statute itself which plainly shows a different intent." As said by Cobb, C. J.:⁵⁹ "The first rule appears . . . inaccurate. The words 'unless it be so declared in the statute' seem to require an express declaration that directing the manner is essential, however important and essential a just view of the policy of the statute may show such provisions to be." The learned chief justice added: "The rule secondly stated contains probably all that the learned justice intended to say in the first, and as a general proposition is doubtless correct. But the intent to make such provision essential may appear

⁵⁵ *School District v. Wallace*, 73 Mo. App. 317.

⁵⁶ *Doores v. Varnon*, 94 Ky. 507, 22 S. W. 852.

⁵⁷ *People v. Cook*, 14 Barb. 259, 290; *Holland v. Osgood*, 8 Vt. 280;

Corliss v. Corliss, id. 373; *Holding*, Ex parte, 56 Ala. 458.

⁵⁸ 14 Barb. 259.

⁵⁹ In *Jones v. State*, 1 Kan. 273.

See *Westbrook v. Rosborough*, 14 Cal. 180; *Kenfield v. Irwin*, 52 id. 164; *People v. Thompson*, 67 id. 627.

as well by the general scope and policy of the statute as by a direct averment. In other words, unless a fair consideration of the statute shows that the legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely." This view was well illustrated by the case in which this language was used. There was a statutory provision relating to a special election for selecting a county seat in these words: "If upon the canvassing of said votes by said commissioners they shall find that no place has received a majority of all the votes cast, it shall be their duty to proclaim the same, and also the time of the second election, as herein provided; and the canvass of the votes of the second election and the proclamation of the result shall be the same as at the first." In a case where there was no choice at the first election, and a second election was held without a proclamation, the court held the provision imperative, and that there was no authority to hold the second election without it. It was an important and necessary provision. "Without it," said the chief justice, "the law provided no means for informing the people that any second election was to be held for the location of the seat of justice, and many of them might, and some of them probably would, know nothing about it."

§ 619 (451). A statute relating to docketing judgments by transcript has been held directory as to clerical particulars.⁶⁰ It was provided that "no judgment shall affect any lands, tenements, real estate or chattels real, or have any preference as against other judgment creditors, purchasers or mortgagees until the record thereof be filed and docketed as herein directed." Those directions were that the clerk, at the time of the filing the record, enter in an alphabetical docket a statement of the judgment, containing among other things the hour and day of entering the same. By another act the clerk, on request and payment of fees, was required to furnish a transcript containing all the facts

⁶⁰ *Sears v. Burnham*, 17 N. Y. 445.

necessary to make a perfect docket of the judgment; and on presenting the transcript to the clerk of any other county, it was his duty to file the same and docket the judgment, specifying among other particulars the day and the hour on which the judgment was perfected, and the day and hour of docketing the same. By a subsequent act, which was the subject of construction, it was declared that "no judgment or decree which shall be entered after this act takes effect shall be a lien upon real estate, unless the same shall be docketed in books to be provided and kept for that purpose by the county clerk of the county where the lands are situate." It was held that an error in the statement of the date, amount, etc., which would be amendable by the court in which the judgment was rendered would not vitiate the lien of such judgment as against persons who have not been actually misled and prejudiced thereby. "It could not, I think," said Strong, J., "have been the intention of the legislature, by any of the provisions in regard to the docketing and lien of judgments, to require a strict, literal compliance in every particular with the requirements as to the contents of the docket, in order that the judgment may be a lien on lands as against other incumbrances. If such a compliance was necessary, a variance of a day or hour as to time, or a single penny as to the amount of the judgment, would vitiate the docket and render it a nullity as to securing a preference over other incumbrances. A substantial observance of those requirements, having reference to the object the legislature had in view of affording information to all who might be affected by the judgment, I am satisfied is all that was designed or is necessary. Those provisions are merely directory; and omissions and variances which cannot work any prejudice are immaterial. It is for the court so to administer the provisions as to the docketing and lien of judgments as carefully to secure the information designed to be given, and at the same time to protect the judgment creditor from the loss of his preference on account of slight

omissions and defects entirely unessential to the docket for the purpose of such information."⁶¹

§ 620 (452). The clause in the constitution requiring the supreme court of appeals to "decide every point fairly arising upon the record, and give its reasons therefor in writing," is directory and does not affect the common-law doctrine of *res judicata*. The court say: "Notwithstanding that clause in the constitution, if the points are involved in the issue, they are *res judicata*, although not mentioned in the opinion of the court or noticed by counsel on either side. That clause of the constitution is merely directory to the court, and it ought to be followed; but it does in no wise change the common-law rule as to the doctrine of *res judicata*. The contrary doctrine would lead to endless litigation; and no suitor could know when his controversy was terminated. There would be anything but repose in such a construction of the constitution as that."⁶² A statute requiring the instructions to the jury to be in writing is directory, and the violation thereof cannot be assigned as error in Texas, though the rule is otherwise in some states.⁶³ So is a provision that the judge shall caution the jury.⁶⁴ A statute requiring the court to number its instructions in consecutive paragraphs was held to be directory.⁶⁵ So of the following: A statute requiring the court to state in writing the grounds upon which it grants or refuses a new trial;⁶⁶ requiring the judge of the county court to read over and sign the record of proceedings at the end of each term;⁶⁷ a statute

⁶¹ See *Hunt v. Grant*, 19 Wend. 90, where a docket was amended *nunc pro tunc* by increasing the amount from \$3,000 to \$30,000. *Hart v. Reynolds*, 3 Cow. 42, note.

⁶² *Henry v. Davis*, 13 W. Va. 230.

⁶³ *Galveston, etc. Ry. Co. v. Dunlavy*, 56 Tex. 256. *Contra*, *Pemberthy v. Lee*, 51 Wis. 261, 8 N. W. 116; *Householder v. Granby*, 40

Ohio St. 430; *Ellis v. People*, 159 Ill. 337, 42 N. E. 837.

⁶⁴ *Thompson v. State*, 26 Ark. 323.

⁶⁵ *Miller v. Preston*, 4 N. M. 396, 17 Pac. 565.

⁶⁶ *Coleman v. Davis*, 13 Colo. 98, 21 Pac. 1018; *Smith v. Sedalia*, 153 Mo. 283, 53 S. W. 907, 48 L. R. A. 711.

⁶⁷ *Watson v. De Witt County*, 19 Tex. Civ. App. 150.

providing that the judge shall examine a child under twelve in proceedings for adoption.⁶⁸ A provision in regard to the number of jurors to be drawn by the county commissioners was held directory and the drawing of forty-four instead of thirty-six, as required by the statute, was held not to vitiate.⁶⁹ A statute requiring depositions to be sealed by the person taking the same, directed to the court in which the cause is pending, with the names of the parties litigant indorsed thereon, was held directory as to the latter provision.⁷⁰

§ 621 (452). Under a statute providing a remedy by the verdict of a jury for the undervaluation of land by highway commissioners, the verdict was required to be certified by the justice who issued the summons. His duties in the premises were of a ministerial character. He had no control of the proceedings. He was not to preside, or to direct the admission or exclusion of evidence, as on a trial before him. His duties were limited to issuing a summons, drawing the names of six jurors, swearing them and witnesses, and finally certifying the verdict. The statute prescribed no penalty, and imposed no forfeiture in case of non-compliance with its provisions. There was no declaration that the verdict should be void for failure to comply with them. It was held that the verification of the verdict was not incapable of being certified in other ways as well as by the justice who issued the summons. It was a formal matter, because it proved nothing that could not be proved in other ways as satisfactorily. Its omission could work no prejudice to the certainty of the proceeding. The affidavit of some of the jurors, or the certificate of another justice, would accomplish the same purpose practically. The proper and just re-assessment and the verdict were the essential matters, and could not be dispensed with; but the certificate was a matter of form, which could be supplied

⁶⁸ *In re Johnson*, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380.

⁷⁰ *Indiana & Ill. Southern Ry. Co. v. Wilson*, 77 Ill. 603.

⁶⁹ *State v. Watson*, 104 N. C. 735, 10 S. E. 705.

by other evidence without prejudice to any one. The misconduct or mistake of a public officer in a matter of mere form should not prevent the attainment of right and justice. The requirement that the justice who issued the summons should certify the verdict was held directory.⁷¹ By statute no ordinance providing for subscription by parishes and municipal corporations to the stock of corporations undertaking works of internal improvements was valid until approved and ratified by a majority of the voters on whose property the tax was proposed to be levied. For the purpose of facilitating the taking of this vote, a certified list of such voters was to be furnished to commissioners. This list was not furnished in a particular case, and its omission was urged as a fatal objection to a subscription pursuant to a favorable vote on a submission of the question. The court held that the provision requiring it was directory and not a condition precedent. "When a formality is not absolutely necessary," say the court, "for the observance of justice, but is introduced to facilitate its observance, its omission, unless there is an annulling clause in the law, will not annul the act."⁷²

§ 622. The requirement that the inspectors of a corporate election be sworn, in the absence of a nullifying clause on account of the omission, was held directory; that the election was not invalidated by the failure of the officers to be sworn.⁷³ A statutory provision that the clerk of the district give notice of the annual meetings was merely directory, and that the proceedings after the meeting were valid although no notice was given.⁷⁴ A board of canvassers cannot reject a poll-book on account of its being transmitted to the clerk through one not an elective officer. Statutes concerning the manner of conducting elections are directory unless the non-compliance is expressly declared to be fatal

⁷¹ *People v. Supervisors*, 34 N. Y. 268.

⁷² *New Orleans v. St. Romes*, 9 La. Ann. 573.

⁷³ *Matter of Mohawk, etc. R. R. Co.*, 19 Wend. 143.

⁷⁴ *Marchant v. Longworthy*, 6 Hill, 646, 3 Denio, 526.

to the validity of the election or will change or make doubtful the result.⁷⁵ Provisions requiring ballots to be initialed by the judges of election,⁷⁶ to be marked in ink,⁷⁷ and to contain the name of the party or principle which the candidate represents,⁷⁸ were held directory. But a provision that a ballot not conforming to certain requirements shall not be counted is mandatory.⁷⁹ The provision that the voter, when he receives his ballot, shall retire alone to one of the places, booths or compartments provided, to prepare his ballot, was held to be directory.⁸⁰ So of a provision that the certificate of nomination shall state the residences of the candidates and of the officer signing the certificate.⁸¹ Where the time of an election is fixed by law, a statute requiring the circuit judge to issue a proclamation for such election is directory.⁸² A statute in regard to elections on the question of creating a municipal debt provided that it should be held by officers appointed by the county court. This was held directory, and an election conducted by officers appointed by the common council, and otherwise fair and regular and according to law, was held valid.⁸³

§ 623. The sheriff was directed by statute, upon making a sale of real estate, to file his certificate of sale in the clerk's office; the statute was held directory, and his omission to file it did not prejudice the proceedings.⁸⁴ So a statute requiring the vote of the common council upon a resolution opening streets in a city to be taken by yeas and nays was held directory.⁸⁵ A statute required the reading

⁷⁵ Wilford v. State, 43 Ark. 62; McCrary on Elections, § 200.

⁷⁶ Truelsen v. Hugo, 87 Minn. 139, 91 N. W. 434.

⁷⁷ State v. Russell, 34 Neb. 116, 51 N. W. 465, 33 Am. St. Rep. 625.

⁷⁸ State v. Norris, 37 Neb. 299, 55 N. W. 1086.

⁷⁹ Lankford v. Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585.

⁸⁰ Hall v. Schoenecke, 128 Mo. 661, 31 S. W. 97.

⁸¹ Hollon v. Center, 102 Ky. 119, 43 S. W. 174.

⁸² Sterritt v. McAdams, 99 Ky. 37, 34 S. W. 903.

⁸³ Fidelity Trust & Safety Dep. Co. v. Morganfield, 96 Ky. 563, 29 S. W. 442.

⁸⁴ Jackson v. Young, 5 Cow. 269, 15 Am. Dec. 453.

⁸⁵ Striker v. Kelley, 7 Hill, 9.

and signing of the minutes of the board of supervisors. This was held merely directory, but it should be scrupulously observed; and the omission to do so, though it may indicate perhaps carelessness, if not incapacity, does not affect the validity of the proceedings.⁸⁶ A statute provided that all warnings for school districts and certain other meetings should, before the same were posted, be recorded by the clerks of such school district, etc., respectively. The provision was held directory as no penalty was attached and the meetings were not declared to be invalid in case of failure.⁸⁷ Statutory provisions as to drawing jurors for a trial are directory, and irregularities therein, when not objected to at the time, are waived.⁸⁸ Provisions requiring a sheriff to note on an execution the day of its receipt,⁸⁹ requiring him to make a levy in the presence of two witnesses,⁹⁰ requiring the secretary of state to publish the act against dueling three months,⁹¹ are directory. A statute which provided how a levy should be made when the defendant in execution failed or refused to point out property was held directory; that is, that he should levy first on personal or movable property, then on uncultivated lands, and lastly on improved lands, establishing that order. Though the failure to make a levy as required by statute might be sufficient in a particular case, properly presented, to set aside the levy and make the officer liable in damages, the sale would not necessarily be void.⁹² The provision in the code as to advertising the adjournment of the supreme court is directory to the clerk, and, if not complied with, still the court may be held at the time fixed in the order of adjournment, and a party not prejudiced by the omission of the clerk cannot complain.⁹³ Compliance with a requirement.

⁸⁶ *Arthur v. Adam*, 49 Miss. 404.

⁹⁰ *Davidson v. Kuhn*, 1 Disney,

⁸⁷ *Adams v. Sleeper*, 64 Vt. 544, 405.

24 Atl. 990.

⁹¹ *State v. Click*, 2 Ala. 26.

⁸⁸ *Cole v. Perry*, 6 Cow. 584.

⁹² *Pearson v. Flanagan*, 52 Tex.

⁸⁹ *Hester v. Keith*, 1 Ala. (N. S.) 266.

316.

⁹³ *Wise v. State*, 34 Ga. 348.

to make a plan for the drainage of the whole city is not imperative or a condition precedent to the power of contracting for work in any of the sewerage districts.⁹⁴

§ 624. Failure of the tax assessor to pin to the assessment roll the affidavit prescribed by statute does not so vitiate the assessment roll as to render nugatory all subsequent proceedings with reference to it and all the sales for taxes under it. It is manifest that the purpose of the legislature was to make all such requirements as this directory and not mandatory in a sense that failure to observe them will annul subsequent proceedings. The court say: "This affidavit is required to be made after the completion of the assessment roll as an additional guaranty to his oath of office to secure the performance of the duty of the assessor in the particular matters to which the affidavit relates. It was assumed that in order to be able to make the required affidavit the assessor would act as it suggests to be necessary in order to make it perfectly, and it was admonitory to him as well as a guide to the board of supervisors as to what was required of him. There is nothing to suggest a purpose in the legislature to make the required affidavit a condition of the validity of the assessment or essential to the jurisdiction of the board of supervisors to deal with the rolls as the law directs. On the contrary, we think the manifest purpose of the legislature was to make all such requirements directory and not mandatory in the sense that failure to observe them will annul subsequent proceedings."⁹⁵ An act creating a levee district provided for a meeting of the land owners of the district to vote on the question of a levee tax, and, if a majority of all were present at the meeting and the tax was carried by a two-thirds vote of those present, then that the president of the levee board should give notice of the fact throughout the district and the tax should be levied.

⁹⁴ Matter of N. Y. Prot. E. Pub. 532, 22 N. W. 705, modifying Marsh School, 47 N. Y. 556. v. Supervisors, 42 Wis. 502, and

⁹⁵ Chesnut v. Elliott, 61 Miss. 569; other cases in Wisconsin to the Fifield v. Marinette Co., 62 Wis. contrary.

The provision as to notice was held to be directory, and that such notice was not essential to the validity of the tax.⁹⁶ A provision that school trustees, authorized to levy taxes, should prefix to their tax list a heading showing for what purpose the different items of the tax were levied, was held to be directory.⁹⁷ An act requiring county auditors to publish a list of lands sold for taxes and unredeemed was held directory.⁹⁸

§ 625. A statute provided that a person intending to apply for a transcript of the record, with a view of applying for an appeal or writ of error, should notify the opposite party or his counsel, and that the clerk should not deliver the same unless it was made to appear that the notice had been given. The provision as to notice was held directory and not an essential condition to the right of appeal.⁹⁹ A statute fixing the place where the sheriff should compare the returns of election is directory.¹ The statute is directory in requiring the board of police to take deeds of trust on real estate to secure the repayment of loans of the common school fund, and makes it the plain duty of the board to do so. But it does not make void a note given for such loan not secured by a trust deed.² Some additional illustrations of statutes held directory are cited in the margin.³

§ 626 (453). **Statutory bonds not conforming with statute.**—In the absence of negative words a bond differing in

⁹⁶ *Memphis Land & Timber Co. v. St. Francis Levee District*, 64 Ark. 258, 42 S. W. 763.

⁹⁷ *Thomson v. Harris*, 88 Hun, 478, 34 N. Y. S. 885.

⁹⁸ *Beumer v. Wall*, 86 Minn. 294, 90 N. W. 530.

⁹⁹ *Mears v. Dexter*, 86 Va. 328, 11 S. E. 538.

¹ *Puckett v. Springfield*, 97 Tenn. 264, 37 S. W. 2.

² Acts of 1854, ch. 345, and of 1856, ch. 27; *Gaines v. Farris*, 39 Miss. 403. See *State v. State Bank*, 5 Ind. 356.

³ *Cambridge v. County Commissioners*, 86 Me. 141, 29 Atl. 960; *Upshur v. Baltimore City*, 94 Md. 743, 81 Atl. 953; *Bick v. Wilkerson*, 62 Mo. App. 31; *Taggart v. Herrick*, 55 Hun, 569, 9 N. Y. S. 758; *Union National Bank v. Scott*, 53 App. Div. 65, 66 N. Y. S. 145; *Jackson v. State*, 30 Tex. Ct. App. 664, 18 S. W. 643; *Pierce v. City Clerk*, 7 Wash. 132, 34 Pac. 428; *United States v. Thoman*, 155 U. S. 353, 15 S. C. Rep. 373, 39 L. Ed. 450.

form and mode of execution from what is required by statute, but containing substantially the required conditions, is valid. Referring to the official bond of a sheriff, Cooley, J., said: "If the several duties which the sheriff is called upon to perform could only arise because of the statute requiring the giving of the bond, there would be abundant reason for saying that until a bond in conformity with the statute was produced no recovery could be had. But this statute does not impose the duties; they would be the same if no official bond were required; and a sheriff *de facto* is charged with them under the same circumstances as is the sheriff *de jure*. It needs no statute to enable the officer to give a valid bond to perform any such duty; and had B. executed to H. and R. a common-law bond, conditioned that he would duly levy and return the execution they placed in his hands, there could have been no doubt of its validity.⁴ When a party gives a bond that he may have some privilege or right, as an office, appeal, *supersedeas*, or the like, and he has the benefit as upon having given the bond required by law, he cannot afterwards avoid responsibility upon it because he has departed in some particular from the statutory form, or omitted some formality in execution, approval or filing.⁵ An appeal bond filed without a required justification of sureties is nevertheless good, and will support the appeal, if the sureties are in fact sufficient. The provision of the statute requiring a justification is so far directory where no different intention is manifest.⁶

⁴ Bay Co. v. Brock, 44 Mich. 45, 6 N. W. 101; United States v. Tingey, 5 Pet. 115, 8 L. Ed. 66; Thompson v. Buckhannon, 2 J. J. Marsh. 416; Governor v. Allen, 8 Humph. 176; Montville v. Houghton, 7 Conn. 543; Commonwealth v. Woolbert, 6 Binn. 292, 6 Am. Dec. 452. See People v. Mitchell, 4 Sandf. 466; People v. Meighan, 1 Hill, 298; Armstrong v. United States, 1 Pet.

C. C. 46, Fed. Cas. No. 549; Van Deusen v. Hayward, 17 Wend. 67.

⁵ Id.; Hester v. Keith, 1 Ala. (N. S.) 316; Bartlett v. Board, 59 Ill. 364; Supervisors v. Kaime, 39 Wis. 468.

⁶ St. Louis, etc. R. R. Co. v. Wilder, 17 Kan. 244. In Hardy v. Heard, 15 Ark. 184, it was declared that the design of the statute in requiring the recital of the judgment, execution, etc., in a sheriff's deed

§ 627 (454). **Mandatory statutes.**—Mandatory statutes are imperative; they must be strictly pursued; otherwise the proceeding which is taken ostensibly by virtue thereof will be void. Compliance therewith, substantially, is a condition precedent; that is, the validity of acts done under a mandatory statute depends on a compliance with its requirements. When a statute is passed authorizing a proceeding which was not allowed by the general law before, and directing the mode in which an act shall be done, the mode pointed out must be strictly pursued. It is the condition on which alone a party can entitle himself to the benefit of the statute, that its directions shall be strictly complied with. Otherwise the steps taken will be void. But when the proceeding is permitted by the general law, and an act of the legislature directs a particular form and manner in which it shall be conducted, then it will depend on the terms of the act itself whether it shall be considered merely directory, subjecting the parties to some disability if it be not complied with, or whether it shall render the proceeding void. If no emancipation were permitted, and an act of the legislature should permit owners of slaves to emancipate them in some prescribed form, if the form were not complied with the act would be void.⁷ Where legislation points out specifically how an act is to be done, although without it the court or officials under their general powers would have been able to perform the act, yet as the legislature imposed a special limitation, it must be strictly pur-

for land sold under execution was to relieve the purchaser from the necessity of producing the judgment, etc., and to leave to the party who would contest the sale to establish its invalidity; that a deed for land sold under execution, not containing the recital mentioned in the statute, did not show on its face a compliance with the law, and could not be evidence

under the statute. But if such deed is in compliance with the statute, it is only *prima facie* evidence, and may be entirely overthrown by evidence that the sale had never been made, or had not been made in accordance with the law. *Moore v. Brown*, 11 How. (U. S.) 414, 424, 13 L. Ed. 751.

⁷ *Monk v. Jenkins*, 2 Hill's Ch. 12.

sued; and although performed by a discretionary officer, the limitation of the statute renders the doing of the act ministerial in him performing it, in which no discretion can be indulged.⁸ Enabling statutes, on the principle of *expressio unius est exclusio alterius*, impliedly prohibit any other than the statutory mode of doing the acts which they authorize.⁹ This is illustrated by the numerous cases where statutory rights and remedies are given in respect to which the statute must be strictly pursued.¹⁰ Where a statute in granting a new power prescribes how it shall be exercised, it can lawfully be exercised in no other way.¹¹ Negative words in granting power or jurisdiction cannot be directory.¹² And even affirmative words, in such a case, without any negative expressed, imply a negative. Where a statutory power or jurisdiction is granted, which otherwise does not exist, whether to a court or an officer; and in all cases where, by the exercise of such a power, one may be divested of his property, the grant is strictly construed; the mode of proceeding prescribed must be strictly pursued; the

⁸ *Hudson v. Jefferson Co. Ct.*, 28 Ark. 359.

⁹ *Dalton v. Murphy*, 30 Miss. 59; *Veazie v. China*, 50 Me. 518; *Wendel v. Durbin*, 26 Wis. 390; *Beltzhoover v. Gollings*, 101 Pa. St. 293.

¹⁰ *Ante*, § 569; *Buckley v. Lowry*, 2 Mich. 419; *Haley v. Petty*, 42 Ark. 392; *People v. Reed*, 5 Denio, 554; *Wilson v. Palmer*, 75 N. Y. 250; *Lane v. Wheeler*, 101 id. 17, 4 N. E. 183; *Stafford v. Bank*, 16 How. 135, 14 L. Ed. 876; *Stafford v. Canal & Banking Co.*, 17 How. 283, 15 L. Ed. 102; *Illinois, etc. R. R. Co. v. Gay*, 5 Ill. App. 393; *Kirk v. Armstrong*, Hempst. 283; *Coffman v. Daveny*, 2 How. (Miss.) 854; *Maxwell v. Wesels*, 7 Wis. 103; *Brown v. Ry. Co.*, 83 Mo. 478; *McLaughlin v. State*, 66 Ind. 193; *Flory v. Wilson*, 83 id.

391; *Dawson's Appeal*, 15 Pa. St. 480; *Cherry Overseers v. Marion Overseers*, 96 id. 523; *Road in Salem Township*, 103 id. 250; *Providence Co. v. Chase*, 108 id. 319; *Harris v. Gest*, 4 Ohio St. 469; *Campbell v. Allison*, 63 N. C. 568; *Bayley v. Hazard*, 3 Yerg. 487; *Whipley v. Mills*, 9 Cal. 641; *Hildreth v. Gwindon*, 10 id. 490; *Elliott v. Chapman*, 15 id. 383; *Gordon v. Wansey*, 19 id. 82; *Dooling v. Moore*, 20 id. 14; *Clinton v. Phillips*, 7 T. B. Mon. 117.

¹¹ *Head v. Ins. Co.*, 2 Cranch, 127, 2 L. Ed. 229; *Best v. Gholson*, 89 Ill. 465; *Franklin Glass Co. v. White*, 14 Mass. 286; *State v. Cole*, 2 McCord, 117.

¹² *Bladen v. Philadelphia*, 60 Pa. St. 464.

provisions regulating the procedure are mandatory as to the essence of the thing required to be done.¹³

§ 628 (455). What the law requires for the protection of the taxpayer, for example, is mandatory, and cannot be regarded as directory merely.¹⁴ "One rule is very plain and well settled," said Shaw, C. J., "that all those measures which are intended for the security of the citizen, for securing equality of taxation, and to enable every one to know with reasonable certainty for what real and personal property he is taxed, are conditions precedent; and if they are not observed he is not legally taxed, and he may resist it in any of the modes provided by law for contesting the validity of the tax. But many regulations are made by statute, designed for the information of assessors and officers, and intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which does in no respect affect the rights of tax-paying citizens. These may be considered as directory; officers may be liable to animadversion, perhaps, to punishment, for not observing them, but yet their observance is not a condition precedent to the validity of the tax."¹⁵ A statute requiring the assessor to attach to his return or assessment roll an affidavit in a prescribed form was held manda-

¹³ *Potter's Dwaris*, 224; *Corwin v. Merritt*, 3 Barb. 341; *Harrington v. People*, 6 id. 607; *People v. Common Council of Brooklyn*, 22 id. 404; *Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299; *People v. Schemerhorn*, 19 Barb. 540; *Common Council of Albany, Ex parte*, 3 Cow. 358; *Barnard v. Viele*, 21 Wend. 89; *Brisbane v. Peabody*, 3 How. Pr. 109; *Rogers v. Murray*, 3 Paige, 390; *Atkins v. Kinnan*, 20 Wend. 249, 32 Am. Dec. 534; *Sherwood v. Reade*, 7 Hill, 431; *Sharp v. Speir*, 4 Hill, 76; *Morse v. Williamson*, 35 Barb. 472; *Sherman v. Dodge*, 6 John. Ch.

107; *Denning v. Smith*, 3 id. 331; *Cohoes Co. v. Goss*, 13 Barb. 137; *Hubbell v. Weldon, Lalor*, 139; *Sibley v. Smith*, 2 Mich. 486.

¹⁴ *Crisman v. Johnson*, 23 Colo. 264, 47 Pac. 296, 58 Am. St. Rep. 224; *State v. Nord*, 73 Minn. 1, 75 N. W. 760, 72 Am. St. Rep. 594; *Kipp v. Robinson*, 75 Minn. 1, 77 N. W. 414; *McCord v. Sullivan*, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561; *Clark v. Crane*, 5 Mich. 151, 71 Am. Dec. 776.

¹⁵ *Torrey v. Millbury*, 21 Pick. 67; *Sibley v. Smith*, 2 Mich. 486.

tory.¹⁶ So of an act that the supervisor require every one in his township to make, subscribe and verify a list of the taxable property owned by him.¹⁷ And so of acts requiring notice of the sale of land for taxes or notice to redeem from tax sale.¹⁸

§ 629 (455). An order of court requiring forty clear days in a summons is mandatory.¹⁹ So is the requirement that there be inserted in venires the command that the officer summon twenty-four persons, "freeholders of his county or corporation residing remote from the place where the offense is charged to have been committed;"²⁰ that all process shall be under the seal of the court;²¹ and a provision as to what a justice's summons shall contain before it is issued.²² So also, that sales of real estate under execution shall take place at the court-house of the county.²³ When the power to affect property is conferred by statute upon those who have no personal interest in it, such power can be exercised only in the manner and under the circumstances specified. The requirement can never be dispensed with as being directory where the act, or omission of it, can by possibility work injury, however slight, to any one affected by it.²⁴ Provisions are directory where they relate to some immaterial matter not of the essence of the thing to be done; where a compliance is matter of convenience rather than substance; where the departure from the statute will cause no injury to any person affected by it.²⁵ The following were held mandatory: Provisions as to what

¹⁶ *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188.

¹⁷ *Turner v. Dickerman*, 95 Mich. 1, 54 N. W. 705.

¹⁸ *State v. Nord*, 73 Minn. 1, 75 N. W. 760, 72 Am. St. Rep. 594; *Kipp v. Robinson*, 75 Minn. 1, 77 N. W. 414; *McCord v. Sullivan*, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561.

¹⁹ *Barker v. Palmer*, L. R. 8 Q. B. Div. 9.

²⁰ *Whitehead v. Commonwealth*, 19 Gratt. 640.

²¹ *Weaver v. Peasley*, 163 Ill. 251, 45 N. E. 119, 54 Am. St. Rep. 469.

²² *Johnson v. Turnell*, 113 Wis. 468, 89 N. W. 515.

²³ *Koch v. Bridges*, 45 Miss. 247.
²⁴ *Id.*

²⁵ *People v. Schemerhorn*, 19 Barb. 558. See *Koch v. Bridges*, 45 Miss. 247; *Hurford v. Omaha*, 4 Neb. 336;

should be contained in the report of commissioners or verdict of a jury in condemnation cases;²⁶ a statute allowing a docket fee of \$25 if the mover prevailed on a motion to retax costs;²⁷ provisions of a penal code as to the time within which an information must be filed and the defendant tried;²⁸ a provision that an ordinance to adopt the general law or any part thereof should be published before its adoption;²⁹ provisions of a city charter that no liability shall be incurred until a definite appropriation is made to meet it;³⁰ a statute requiring that notice of the adoption of a prohibition act be published;³¹ a statute requiring an appeal to be taken or notice of appeal to be served within a prescribed time.³² A local option act provided that, when the board of supervisors ordered an election under the act, the order should be entered in full upon the journal of the proceedings of the board for that day, and signed by the acting chairman and clerk before final adjournment. The provision was held mandatory.³³ Statutes requiring that on the passage of ordinances or other measures the yeas and nays shall be taken and entered on the journals are usually held mandatory.³⁴

Best v. Gholson, 89 Ill. 465; *People v. Cook*, 14 Barb. 290, 8 N. Y. 67; *Marsh v. Chesnut*, 14 Ill. 223; *Clark v. Crane*, 5 Mich. 151; *State v. McLean*, 9 Wis. 292; *Norwegian Street*, 81 Pa. St. 349; *McKune v. Weller*, 11 Cal. 49.

²⁶ *Otero Canal Co. v. Fosdick*, 20 Colo. 522, 39 Pac. 332.

²⁷ *First National Bank v. Neill*, 13 Mont. 377, 34 Pac. 180.

²⁸ *People v. Morino*, 85 Cal. 515, 24 Pac. 892.

²⁹ *Herman v. Oconto*, 100 Wis. 391, 76 N. W. 364.

³⁰ *Smith Canal Co. v. Denver*, 20 Colo. 84, 36 Pac. 844.

³¹ *Toole v. State*, 88 Ala. 158, 7 So. 42.

³² *Heil v. Simmonds*, 17 Colo. 47, 28 Pac. 475; *Seattle & Mont. Ry. Co. v. O'Meara*, 4 Wash. 17, 29 Pac. 835.

³³ *Pearsall v. Supervisors*, 71 Mich. 438, 39 N. W. 578; *Weston v. Monroe*, 84 Mich. 341, 47 N. W. 446; *Covert v. Munson*, 93 Mich. 603, 53 N. W. 733.

³⁴ *Heisey v. Risser*, 3 Pa. Supr. Ct. 196; *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. Rep. 90, citing as holding the same rule, *Tracey v. People*, 6 Colo. 151; *Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 413; *Sullivan v. Leadville*, 11 Colo. 483, 18 Pac. 736; *Cutler v. Russellville*, 40 Ark. 105; *Rich v. Chicago*, 50 Ill. 287; *Olin v. Meyers*, 55 Iowa, 209; *Morrison v. Lawrence*,

§ 630 (456). The special powers given to corporations, to courts or officers must be exercised with strict, substantial adherence to all directions of the statute.³⁵ When a statute which grants power or authority has expressly fixed, limited or declared the time, with reference to essential antecedent acts, when such authority shall begin to be exercised, all other time is excluded; *expressio unius est exclusio alterius*.³⁶ It was held under an act relative to the organization of corporations, which provided that "when the certificate has been filed as aforesaid the persons who shall have signed and acknowledged such certificate and their successors shall be a body politic and corporate," that until this certificate had been so filed there was no provision making such persons a corporation; therefore the filing of it was a condition precedent.³⁷ A body corporate, created for a special purpose, with limited powers, being a creature of the statute, must conform in its action to the law of its creation, and acts done contrary to such regulations are simply void.³⁸ In statutory proceedings the statute must be substantially complied with; every act required which is jurisdictional, or of the essence of the proceeding, or prescribed for the benefit of the party to be affected thereby, must be done; the requirement is mandatory.³⁹ Of this nature is the

98 Mass. 219; *Steckert v. East Saginaw*, 22 Mich. 103; *O'Neil v. Tyler*, 3 N. D. 47, 53 N. W. 434. *Contra*, *Striker v. Kelly*, 7 Hill, 29; *S. C.* affirmed, 2 Denio, 323; *Elmensdorf v. New York*, 25 Wend. 693.

³⁵ *Cope v. Thames Haven, etc. Co.*, 3 Ex. 841; *Diggie v. London, etc. R. R. Co.*, 5 id. 442; *Des Moines v. Gilchrist*, 67 Iowa, 210, 25 N. W. 136, 56 Am. Rep. 341; *Pittsburg v. Walter*, 69 Pa. St. 365; *Pensacola v. Reese*, 20 Fla. 437; *Norwegian Street*, 81 Pa. St. 349; *Chollar Mining Co. v. Wilson*, 66 Cal. 374, 5 Pac. 670; *Seymour v. Judd*, 2 N. Y. 464; *Childs v. Smith*, 55 Barb. 45.

³⁶ *Childs v. Smith*, 55 Barb. 45.

³⁷ *Id.*; *Bigelow v. Gregory*, 73 Ill. 197. See *Vanneman v. Young*, 52 N. J. L. 403, 20 Atl. 53; *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54.

³⁸ *Cope v. Thames Haven, etc. Co.*, 3 Ex. 841; *Frend v. Dennett*, 4 C. B. (N. S.) 576; *Gordon v. Winchester Building Ass'n*, 12 Bush. 110, 23 Am. Rep. 713; *Beckett v. Uniontown Building Ass'n*, 88 Pa. St. 211; *Workingmen's Building Ass'n v. Coleman*, 89 id. 428.

³⁹ *United States v. Wyngall*, 5 Hill, 16; *Olcott v. Frazier*, id. 562; *Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson*, id. 92, 40 Am. Dec. 259; *In*

certificate of a justice of the peace of the town where the parties reside, as to the death of an infant's father, required by a statute relative to the binding of infants as apprentices to be given, before the consent of the mother can be deemed sufficient, and the indorsement of such certificate on the indenture itself.⁴⁰ Every material requirement must be strictly observed in carrying out the laws for condemning private property to public uses, and the proceedings must show affirmatively on their face a substantial adherence to the course prescribed by the statute.⁴¹ Land cannot be taken without compliance with the preliminary requirement to endeavor to agree with the owner upon the compensation.⁴²

§ 631 (457). Where work required by a municipal charter to be let by contract on competitive bidding has been done by day's work there is a fatal departure from the statute.⁴³ An act requiring a preliminary notice for the benefit of persons to be affected, or the information of the public, when a statutory power is to be exercised, is mandatory.⁴⁴ A provision prohibiting the passing or adopting of certain resolutions by the common council until two days after the publication thereof in a prescribed manner, held mandatory; that compliance was essential — jurisdic-

re *Petition of Ford*, 6 Lans. 92; *Bennett v. Drain Commissioner*, 56 Weed v. Lyon, Walk. Ch. 77; *Galpin v. Abbott*, 6 Mich. 17; In re *Selby*, 6 Mich. 193; *O'Donnell v. McIntyre*, 37 Hun, 615; *Thurston v. Prentiss*, 1 Mich. 193; *Duanesburgh v. Jenkins*, 46 Barb. 294; *Wheeler v. Mills*, 40 id. 644; *Whitney v. Thomas*, 23 N. Y. 281; *Hascall v. Madison University*, 8 Barb. 174; In re *Petition of Folsom*, 2 T. & C. 55.

⁴⁰ *People v. Gates*, 57 Barb. 291; *People v. Adirondack Co.*, id. 656.

⁴¹ *Kroop v. Forman*, 31 Mich. 144;

Mich. 634, 23 N. W. 449.

⁴² *People v. Hillsdale, etc. T. Co.*, 2 John. 190.

⁴³ *Matter of Manhattan R. R. Co.*, 102 N. Y. 301, 6 N. E. 590; In re *Emigrant Industrial Savings Bank*, 75 N. Y. 388; In re *Merriam*, 84 id. 596, 609; In re *Weil*, 83 id. 543; In re *Lange*, 85 id. 307.

⁴⁴ *Lane v. Burnap*, 39 Mich. 736; *Barnett v. Scully*, 56 id. 374, 23 N. W. 50; *Bennett v. Drain Comm'r*, 39 Mich. 634, 23 N. W. 449; *Welker v. Potter*, 18 Ohio St. 85.

tional.⁴⁵ So one requiring a comptroller to publish notices stating when the time for redemption of land sold for taxes would expire. It is intended for the protection of the landowner, and unless complied with no title will pass by the deed.⁴⁶

§ 632 (458). Statutes which confer new right, privilege, etc.—Where a statute confers a new right, privilege or immunity the grant is strictly construed, and the mode prescribed for its acquisition, preservation, enforcement and enjoyment is mandatory. An instance of such legislation is that relating to married women, by which they may acquire and dispose of property, make contracts in regard to it, and assert other rights. Such statutes, providing the form and mode of exercising the rights thus given, are mandatory; they must be followed substantially to give validity to their acts.⁴⁷ The same is true in regard to copyrights.⁴⁸ Where a statute provided for sealed bids to be received until a certain day, when they are required to be opened, all bids put in after that day are excluded.⁴⁹

§ 633 (459). Where an existing right or privilege is subjected to regulation by a statute in negative words, or those which import that it is only to be exercised in a prescribed

⁴⁵ *In re the Petition of Douglass*, 46 N. Y. 42.

⁴⁶ *Westbrook v. Willey*, 47 N. Y. 457; *Cruger v. Dougherty*, 43 id. 107; *Doughty v. Hope*, 3 Denio, 594, 1 N. Y. 79.

⁴⁷ *Bartlett v. O'Donoghue*, 72 Mo. 563; *Hoskinson v. Adkins*, 77 id. 537; *Bagley v. Emberson*, 79 id. 139; *Beckman v. Stanley*, 8 Nev. 257; *Shumaker v. Johnson*, 35 Ind. 33; *Mattox v. Hightshue*, 39 id. 95; *Callum v. Pettigrew*, 10 Heisk. 394; *Leggate v. Clark*, 111 Mass. 308; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Trimmer v. Heagy*, 16 Pa. St. 484; *Glidden v. Strupler*, 52 id. 400; *Dunham v. Wright*, 53 id. 167; *Graham*

v. Long, 65 Pa. St. 383; *Miller v. Wentworth*, 82 id. 280; *Innis v. Templeton*, 95 id. 262, 40 Am. Rep. 643; *Miller v. Ruble*, 107 Pa. St. 395; *Montoursville Overseers v. Fairfield Overseers*, 112 id. 99, 3 Atl. 862.

⁴⁸ *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055; *Jollie v. Jaques*, 1 Blatchf. 618, Fed. Cas. No. 7437; *Baker v. Taylor*, 2 Blatchf. 82, Fed. Cas. No. 782; *Newton v. Cowie*, 4 Bing. 234; *Avanzo v. Mudie*, 10 Ex. 203; *Brooks v. Cock*, 3 Ad. & E. 141; *Henderson v. Maxwell*, L. R. 5 Ch. Div. 892; *Mathieson v. Harrod*, L. R. 7 Eq. 270.

⁴⁹ *Webster v. French*, 12 Ill. 302.

manner, the mode so prescribed is imperative.⁵⁰ A provision of the Wisconsin registry law was that "no vote shall be received at any annual election in this state, unless" certain previous conditions were complied with; it was held to be imperative; that all votes received in violation of the regulation should be rejected in an action to try the title to an office.⁵¹ Where the language of a statute is that no debt or contract thereafter incurred or made by a municipal corporation shall be binding . . . unless authorized by law or ordinance, and an appropriation sufficient to pay the same is previously made, it is mandatory, and the power to contract is limited accordingly.⁵² The provisions of the statute of frauds are another notable instance of mandatory regulations. Where the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other manner, no doubt can be entertained that the command is imperative.⁵³ The enactment, for instance, of the metropolitan building act,⁵⁴ that the walls of buildings shall be constructed of brick, stone or other incombustible material, though containing no prohibitory words, obviously prohibits by implication and makes illegal their construction with any other.⁵⁵ A statute provided that an assignment for the benefit of creditors shall be duly acknowledged by the assignor, and the certificate thereof duly indorsed, before delivery to the assignee; that the assignor at the date of the assignment, or within twenty days thereafter, make and deliver to the judge of the county of his residence a schedule, verified by him, as prescribed by

⁵⁰ *Stayton v. Hulings*, 7 Ind. 144; *tive provision or prohibition was*
Union Bank v. Laird, 2 Wheat. 390, *directory.*
4 L. Ed. 269.

⁵¹ *State v. Hilmantel*, 21 Wis. 566; *St. 464.*
State v. Stumpf, 23 Wis. 630; *In re*

Election of McDonough, 105 Pa. St. ⁵² *Bladen v. Philadelphia*, 60 Pa.

488. See *Dale v. Irwin*, 78 Ill. 170, ⁵³ *Endl. on St.*, § 431.

and *Clark v. Robinson*, 88 Ill. 498, ⁵⁴ 18 and 19 Vict., ch. 122, § 12.

where it was held that the nega- ⁵⁵ *Id.*; *Stevens v. Gourley*, 7 C. B. (N. S.) 99.

the act, containing a full and true account of all his creditors and their residences, as far as known; the sum owing to each creditor, and the nature of the debt and how it arose; the consideration of the debt and the place where it arose; a statement of any security for any debt, etc. This statute also required a bond from the assignee for faithful performance of the trust. These provisions were held mandatory.⁵⁶

⁵⁶ *Juliand v. Rathbone*, 39 N. Y. 369. Grover, J., delivering the opinion of the court, said: "In construing these two latter sections, the supreme court . . . applied the rule adopted in the construction of statutes, prescribing the time for the performance of official acts by public officers, in the performance of which the public have an interest. In construing these latter statutes it is well settled that, where the act prescribes a time for the performance of the act, without anything prohibiting the doing it after the time so fixed, the act shall be valid if performed after the time prescribed. The reason for this construction is that the public, or some portion thereof, have an interest in the performance of the act, and, to prevent injury from the *laches* of the officer, the rule has been adopted. That class of cases holding that, where the common law confers a right or gives a remedy, and a statute is enacted conferring a new right or giving a new remedy, it will be so construed as not to take away the common-law right or remedy, unless it contains negative words showing that such was the legislative intent, was somewhat relied on; neither class

is analogous to the present statute. The acts to be performed are by private persons, not public officers. The act creates no new right or remedy, but is designed to regulate an existing right merely. In construing such statutes the common-law rule, as laid down by the elementary writers, is to consider, first, what mischief, if any, resulted from the exercise of the common-law right; second, what is the remedy provided by the statute for such mischief; third, to give the statute such construction, if practicable, as will suppress the mischief and make the remedy efficient. Applying the rule to the present statute the mischief to be remedied is obvious: to prevent pretended assignments being made obstacles in the way of creditors. The first section provides that it shall be acknowledged, and the proof thereof certified before delivery. This court has held (*Hardmann v. Bowen*, 39 N. Y. 196) that an assignment delivered without such acknowledgment and certificate is void. This does not necessarily determine the effect of non-compliance with the requirements of the two following sections, as the judgment may be upheld by the provision that the acknowl-

§ 634 (460). Statutes which are permissive in form.—

Where statutes are couched in words of permission, or declare that it shall be lawful to do certain things, or provide that they may be done, their literal signification is that the

edgment, etc., shall be made before the delivery of the assignment. But in the absence of this, I think the same construction should be given to the clause, which then would read, every conveyance made by a debtor in trust for his creditors shall be acknowledged. Experience has shown that debtors frequently, with a view to defraud their creditors, and make compositions with them advantageous to themselves, made general assignments of all their property in trust for creditors, giving no information of the character, situation or value of the property assigned, or the amount of the debts, residence of creditors, whether the debts were secured, and giving no information to a creditor to enable him to ascertain anything in relation to the value of the property assigned, or the amount and *bona fides* of the debts entitled to share in the proceeds of the property." After pointing out how compliance with the provisions of the statute in question would remedy these evils, the learned judge continued: "But, in case of failure so to comply, the assignment must be adjudged void. This construction will render these sections efficient in suppressing fraud, while that adopted by the supreme court [holding these provisions directory] renders them almost nugatory and useless."

"To make," says Cassoday, J., "a

voluntary assignment for the benefit of, or in trust for, creditors, valid as against the creditors of the person making the same, it is essential that all the requirements of the statutes should be substantially complied with." *Shakman v. Schlueter*, 77 Wis. 402, 46 N. W. 542, citing *Fuhrman v. Jones*, 68 Wis. 497, 32 N. W. 547; *Clark v. Lamoreux*, 70 Wis. 508, 36 N. W. 393; *Hanson v. Dunn*, 76 Wis. 455, 45 N. W. 319.

In the following cases the statutes in question were held to be mandatory: *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226; *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. 599; *Ellis v. People*, 159 Ill. 337, 42 N. E. 837; *Sego v. Stoddard*, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468; *Lynn v. County Commissioners*, 148 Mass. 148, 19 N. E. 171; *Wilcox v. Hosmer*, 83 Mich. 1, 47 N. W. 29; *Mills v. Detroit*, 95 Mich. 422, 54 N. W. 897; *State v. Warner*, 66 Mo. App. 149; *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585; *Johnson v. Detrick*, 152 Mo. 243, 53 S. W. 891; *Price v. Lush*, 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467; *Orr v. Bailey*, 59 Neb. 128, 80 N. W. 495; *State v. Otis*, 68 N. J. L. 64, 52 Atl. 305; *Roberts v. Fargo*, 10 N. D. 230, 86 N. W. 726; *Hannan v. Greenfield*, 36 Ore. 97, 58 Pac. 888; *State v. District of Narragansett*, 16 R. I. 424, 16 Atl. 901; *Field v. Hall*, 16 Tex. Civ. App. 233, 40 S. W. 749; *Shank v. Ravenswood*, 43 W. Va.

persons, official or otherwise, to whom they are addressed are at liberty or have the option to do those things or refrain, at their election. Where it was provided that the capital stock of a bank might consist of a certain sum, the provision was held discretionary and not imperative.⁵⁷ Story, J., said: "The argument of defendants is, that 'may' in this section means 'must,' and reliance is placed upon a well-known rule in the construction of public statutes where the word 'may' is often construed as imperative. Without question such a construction is proper in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject further than that the exposition ought to be adopted in this as in other cases which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions." The words in a statute, "it shall be lawful," of themselves, merely make that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only. But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to show that there is an obligation to comply.⁵⁸ The lord chancellor said: "The words 'it shall be lawful' confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit

242, 27 S. E. 228; *Duecker v. Goeres*, 57 *Minor v. Mechanics' Bank*, 1
 104 Wis 29, 80 N. W. 91; *State v. Pet.* 46, 7 L. Ed. 47.
Johnson, 105 Wis. 90, 80 N. W. 1104; 58 *Julius v. Lord Bishop of*
Baier v. Hosmer, 107 Wis. 380, 83 *Oxford*, L. R. 5 App. Cas. 214.
 N. W. 645.

the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called on to do so. Whether the power is one coupled with a duty such as I have described is a question which according to our system of law, speaking generally, it falls to the court of queen's bench to decide, on an application for a *mandamus*. And the words 'it shall be lawful,' being according to their natural meaning permissive and enabling only, it lies on those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."⁵⁹

§ 635 (461). On an indictment against church wardens for not making a rate to reimburse the constables, the statute appears to have used the words "may make a rate," but it was naturally held that the constables were entitled to be reimbursed, and that the church wardens, being made the depositaries of a power for that purpose, could not refuse to exercise it.⁶⁰ *Rex v. Havering Atte Bower*⁶¹ was the case of a *mandamus* in reference to the power granted by royal charter to the steward and suitors of a manor, giving them authority to hear and determine civil suits. It was held that this was in effect the establishment of a court for the public benefit, and that the steward and suitors of the manor were bound to hold the court. In *Macdougall v. Patterson*⁶² the question was whether the plaintiff in a county court action who had recovered his debt should not have his costs taxed and allowed in a particular way. The statute had provided there, that under the circumstances in which the plaintiff stood, the court might, by rule or order, direct that he might recover his costs; and Jervis, C. J., delivering the opinion of the court, stated that the conclusion to be drawn from the cases was that, when a statute confers an authority to do a judicial act in a certain case, it

⁵⁹ *Blackwell's Case*, 1 Vern. 152.

⁶¹ 5 B. & Ald. 691.

⁶⁰ *Rex v. Barlow*, 2 Salk. 609.

⁶² 11 C. B. 755.

is imperative on those so authorized to exercise the authority, when the case arises, and its exercise is duly applied for by a party interested, and having the right (that is, having by statute the right) to make the application. The case of *Morrisse v. Royal British Bank*⁶³ was a case of the same kind, and decided that, under the words "it shall be lawful for the court," a creditor who had obtained judgment against a joint-stock banking company, and had failed to collect his debt against it, was entitled as of right to an execution against a shareholder on complying with the conditions imposed by the statute. In *Regina v. Tithe Commissioners*⁶⁴ a power was given to the tithe commissioners in dealing with certain land-owners to confirm agreements for commutations of tithe, under certain special circumstances and conditions. The court held, upon the construction of the whole statute, that if a case occurred, coming within the terms of the statute, the commissioners were bound to confirm the agreement there mentioned. In delivering the opinion of the court Mr. Justice Coleridge observed: "The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that in public statutes words only directory, permissive or enabling may have a compulsory force, where the thing to be done is for the public benefit or in advancement of public justice."

§ 636 (462). There is much conflict of authority on this question in this country as well as in England, owing probably in great part to diverse circumstances distinguishing the cases and indicating the intention with which the permissive words were employed. It is believed that the conclusion reached in the cases mentioned in the preceding section is supported by a preponderating weight of reason and authority. In all cases where the words "it shall be lawful" or the word "may," or any equivalent permissive expression, is employed with reference to a court of justice, and independently of any precise conditions expressed or

⁶³ 1 C. B. (N. S.) 67.

⁶⁴ 14 Q. B. 459.

implied, they give the tribunal jurisdiction, leaving it to exercise its discretion according to the requirements of justice in each particular case.⁶⁵ Where, with reference to conditions expressed or implied, or independent of any special circumstances, it is manifestly intended that the power should be exercised for the promotion of justice or the public good, such permissive words are imperative in the former case upon the requisite conditions being shown, and in the other upon application by those entitled to invoke the exercise of the power, such circumstances as were needful having been considered by the legislature.⁶⁶ Permissive words in respect to courts or officers are imperative in those cases in which the public or individuals have a right that the power so conferred be exercised.⁶⁷ Such words, when used in a statute, will be construed as mandatory for the purpose of sustaining and enforcing rights, but not for the purpose of creating a right or determining its character: they are peremptory when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interest or the rights of third persons.⁶⁸ A direction contained in a statute, though

⁶⁵ *Re Bridgman*, 1 Drew. & S. at p. 169; *Rex v. Justices of Norfolk*, 4 B. & Ad. 238; *Castelli v. Groom*, 18 Q. B. 490; *Reg. v. Bishop of Oxford*, L. R. 4 Q. B. Div. 525; *Julius v. Bishop of Oxford*, L. R. 5 App. Cas. 214; *Beach v. Reynolds*, 64 Barb. 506; *Jarman, Ex parte*, L. R. 4 Ch. D. at p. 838; *State v. Garrity*, 98 Iowa, 101, 67 N. W. 92; *Dorland v. Burlingame*, 78 Mich. 182, 44 N. W. 52.

⁶⁶ *Girdlestone v. Allan*, 1 B. & C. 61; *Cook v. Tower*, 1 Taunt. 372; *Barber v. Gamson*, 4 B. & Ald. 281; *Crake v. Powell*, 2 E. & B. 210; *Macdougall v. Paterson*, 11 C. B. 755; *Asplin v. Blackman*, 7 Ex. 386; *Reg. v. Williams*, 2 C. & K. 1001; *Bower*

v. Hope Life Ins. Co., 11 H. L. Cas. 389, 402; *Marson v. Lund*, 13 Q. B. 664; *Morisse v. Royal B. Bank*, 1 C. B. (N. S.) 67; *Reg. v. Boteler*, 4 B. & S. 989; *Reg. v. Mayor of Harwich*, 8 Ad. & E. 919; *Roles v. Rosewell*, 5 T. R. 538; *Hardy v. Bern*, id. 636; *Tolmie v. Dean*, 1 Wash. Ty. 47.

⁶⁷ *Tarver v. Commissioners' Court*, 17 Ala. 527; *Mitchell v. Duncan*, 7 Fla. 18; *Reg. v. Adamson*, L. R. 1 Q. B. Div. 201; *David v. Levy*, 119 Ala. 241, 24 So. 589; *Smith's Petition*, 5 Pa. Dist. Ct. 465.

⁶⁸ *Banks, Ex parte*, 28 Ala. 28; *Rex v. Barlow*, 2 Salk. 609; *Johnston v. Pate*, 95 N. C. 68; *Lynn v. County Com'rs*, 148 Mass. 148, 19 N. E. 171; *Bowen v. Minneapolis*, 47

couched in merely permissive language, will not be construed as leaving compliance optional, when the good sense of the entire enactment requires its provisions to be deemed compulsory.⁶⁹ Where a statute confers power upon a corporation, to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words "power and authority" in such case mean duty and obligation.⁷⁰

§ 637 (462). **Permissive statutes held mandatory.**—The words "authorized and empowered" are imperative in respect to a board of supervisors where parties improperly assessed are entitled, under conditions stated in the statute, to have taxes refunded by the act and decision of such board.⁷¹ The "power to levy all needful taxes and to pay and discharge all claims on or against the county which have been expressly or impliedly authorized by law" conveys authority and imposes the duty of providing for any local object sanctioned by the legislature.⁷² An act provided that a city council might, "if it believe the public good and the best interests of the city required it," levy a tax to pay its funded debt; and it was held imperative; that a *mandamus* lay at the instance of a creditor to compel such a tax to be levied. The court said: "The discretion thus given cannot, consistently with the rules of law, be resolved in the negative. The rights of the creditor and the ends of justice demand that it should be exercised in favor

Minn. 115, 49 N. W. 683, 28 Am. St. Rep. 333; *State v. Bayonne*, 56 N. J. L. 297, 28 Atl. 713; *Clark v. Elizabeth*, 61 N. J. L. 565, 40 Atl. 737; *People v. Common Council*, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563; *People v. Supervisors*, 49 Hun, 32, 1 N. Y. S. 460; *People v. Board of Trustees*, 71 Hun, 188, 24 N. Y. S. 532; *Erskine v. Nelson County*, 4 N. D. 66, 58 N. W. 348, 27 L. R. A. 696; *Brawley v. Mitchell*, 92 Wis. 671, 66 N. W. 799.

⁶⁹ *Carbaugh v. Sanders*, 13 Pa. Supr. Ct. 361.

⁷⁰ *Mayor, etc. v. Marriott*, 9 Md. 160; *Commissioners of Pub. Schools v. County Com'rs*, 20 id. 449; *Barnes v. Thompson*, 2 Swan, 317; *Dallas v. Dallas Consol. Elec. St. Ry. Co.*, 95 Tex. 263, 66 S. W. 835.

⁷¹ *People v. Board of Supervisors*, 56 Barb. 452.

⁷² *Com'rs of Pub. Schools v. Co. Com'rs*, 20 Md. 449.

of affirmative action.”⁷³ In another case the same court said: “The conclusion to be deduced from the authorities is, that where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in effect peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty.”⁷⁴

§ 638. Same.—A county had a large amount of void warrants outstanding. The legislature passed an act *empowering* the county commissioners to issue \$30,000 of bonds and to levy a tax to pay them, and directing the county treasurer, when the bonds were issued, to sell the same and call in all outstanding warrants. The act was held in effect to validate the outstanding warrants, and the authority was held to be *mandatory* upon the county commissioners.⁷⁵ And generally where a public body is authorized to pay a claim which, by reason of irregularity or want of power, is not enforceable, the authority must be exercised.⁷⁶ The same

⁷³ Galena v. Amy, 5 Wall. 705, 709, 18 L. Ed. 560.

⁷⁴ Supervisors v. United States, 4 Wall. at pp. 446, 447, 18 L. Ed. 419; Hogan v. Devlin, 2 Daly, 184.

⁷⁵ Erskine v. Nelson County, 4 N. D. 66, 58 N. W. 348, 27 L. R. A. 696.

⁷⁶ Bowen v. Minneapolis, 47 Minn. 115, 49 N. W. 683, 28 Am. St. Rep. 333; People v. Common Council,

140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563; People v. Supervisors, 49 Hun, 32, 1 N. Y. S. 460. In the last case the court says: “The act being passed to enable the defendant to perform a public duty, in discharge of a just claim, is, upon well-settled principles, entitled to such construction as will give mandatory import to the words used, and impose upon the defendant the

is true of a statute which *authorizes* municipalities to make compensation for a change of grade.⁷⁷ The following statutes, though permissive in form, were held to be *mandatory* in fact and to imperatively require the exercise of the power conferred: A charter provision that, in case of a vacancy in the office of village trustee, the remaining trustees *should have power* to call a special election to fill the vacancy;⁷⁸ a statute that, when a trunk sewer is constructed for the benefit of a district, *it shall and may be lawful* to assess the cost upon all property benefited;⁷⁹ an act *authorizing* the chancellor to require the complainant to give a bond before appointing a receiver.⁸⁰ An act forbade any one engaging in the business of a detective for hire without a license and provided that "it shall and may be lawful" for the court of quarter sessions to grant such license upon satisfactory proof of the competency and integrity of the applicant. The duty to grant the license upon the production of such proof was held imperative.⁸¹

§ 639. **Permissive statutes held not mandatory.**—The legislature of Connecticut, by resolution passed in 1899, empowered the common council of a city to issue \$300,000 of bonds to build a new city hall, the erection of which was to be in charge of a committee specially provided for. In 1901 another resolution authorized the issue of additional bonds for the same purpose and for furnishing the building and also made some change in the committee. It was held that the scheme was permissive and not mandatory and rested in the discretion of the council.⁸² An act conferring upon boards of supervisors and corporate authorities the

duty to exercise the power thus given." p. 34. Compare *People v. Gilroy*, 82 Hun, 500, 32 N. Y. S. 10, where such a statute was held not to be mandatory.

⁷⁷ *Clark v. Elizabeth*, 61 N. J. L. 565, 40 Atl. 737.

⁷⁸ *People v. Board of Trustees*, 71 Hun, 188, 24 N. Y. S. 532.

⁷⁹ *State v. Bayonne*, 56 N. J. L. 297, 28 Atl. 713.

⁸⁰ *David v. Levy*, 119 Ala. 241, 24 So. 589.

⁸¹ *Smith's Petition*, 5 Pa. Dist. Ct. 465.

⁸² *Staples v. Bridgeport*, 75 Conn. 509, 54 Atl. 194.

power to grant licenses to sell liquors, upon a petition signed by a majority of the voters in the territory involved, was held not to be mandatory.⁸³ So of a statute providing that it should be lawful for the judge in a street-opening case to order the payment by the city to the defendant of a reasonable attorney's fee.⁸⁴ An act provided that if a juror became sick the court might discharge him, impanel a new juror and begin the trial anew or discharge the entire jury and impanel a new jury. It was held that the statute was directory and that the court was not compelled to pursue either alternative, but could adjourn until the juror was able to go on.⁸⁵

§ 640. The words "may" and "shall."—In *Canal Commissioners v. Sanitary District*⁸⁶ the court says: "The words 'may' and 'shall,' when used in a statute, will sometimes be read interchangeably, as will best express the legislative intent. The word 'may' will be construed to mean 'shall' where the public or third persons have a claim that the power ought to be exercised; but where the word 'shall' is used, where no right or benefit depends on its imperative use, that word may be held directory merely, and by legislative intention to be used synonymously with the word 'may.'" The words "may" and "shall" are to be taken in their ordinary and usual sense, unless the sense and intent of the statute require one to be substituted for the other.⁸⁷ The general rule is that the word "may" will be construed as "shall," or as imposing an imperative duty, whenever it is employed in a statute to delegate a power, the exercise of which is important for the protection of public or private interests.⁸⁸ Whether merely permissive or imperative de-

⁸³ *Perkins v. Ledbetter*, 68 Miss. 327, 8 So. 507.

⁸⁴ *Dorland v. Burlingame*, 78 Mich. 182, 44 N. W. 52.

⁸⁵ *State v. Garrity*, 98 Iowa, 101, 67 N. W. 92.

⁸⁶ 184 Ill. 597, 604, 605, 56 N. E. 953.

⁸⁷ *Rothschild v. New York Life*

Ins. Co., 97 Ill. App. 547; *Board of Commissioners v. Davis*, 136 Ind. 503, 36 N. E. 141; *Miles v. Wells*, 23 Utah, 55, 61 Pac. 534.

⁸⁸ *Snell v. Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; *Pierson v. People*, 204 Ill. 456, 68 N. E. 383; *Furbish v. County Commissioners*, 93

pend on the intention as disclosed by the nature of the act in connection with which the word is employed and the context.⁸⁹

A statute provided that the certificate of tax sale *may* be substantially in "the following form." The word *may* in this provision was held to be equivalent to *shall*.⁹⁰ The use of both *may* and *shall* in the same provision may afford a very forcible indication of the intention. Thus, the use of words that are plainly compulsory in one aspect, and the use of others which literally are permissive in another, necessarily leads to an inference that the primary meaning is to be retained.⁹¹ It is provided by the 18 and 19 Vict., chapter

Me. 117, 44 Atl. 364; *State v. Jersey City*, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281.

⁸⁹ *Lewis v. State*, 3 Head, 127; 1 Kent's Com. 463; *Minor v. Mechanics' Bank*, 1 Pet. 46, 64, 7 L. Ed. 47.

The word "may" was held imperative in the following cases: *Board of County Commissioners v. Smith*, 22 Colo. 534, 45 Pac. 357; *People v. Rio Grande County*, 7 Colo. App. 229, 42 Pac. 1032; *Canal Commissioners v. Sanitary District*, 184 Ill. 597, 56 N. E. 953; *Dabney v. Dabney*, 20 App. Cas. (D. C.) 440; *Snell v. Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; *Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372, 36 N. E. 88; *Board of Trustees v. Maysville*, 97 Ky. 145, 30 S. W. 1; *Furbish v. County Commissioners*, 93 Me. 117, 44 Atl. 364; *State v. Knowles*, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695; *State v. King*, 136 Mo. 309, 36 S. W. 681, 38 S. W. 80; *Montana Ore Purchasing Co. v. Lindsay*, 25 Mont. 24, 63 Pac. 715; *Doane v. Omaha*, 58 Neb. 815, 80 N. W. 54; *Yates v. Omaha*, 58 Neb. 817, 80 N. W. 1134; *State v. Jersey City*,

57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281; *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686; *McLeod v. Scott*, 21 Ore. 94, 26 Pac. 1061, 29 Pac. 1; *Petition of Whitney*, 18 Phila. 670; *Walton v. Walton*, 96 Tenn. 25, 33 S. W. 561.

In the following cases the word "may" was held to be permissive: *Kemble v. McPhaill*, 128 Cal. 444, 60 Pac. 1092; *United States v. Holrendorf*, 20 App. Cas. (D. C.) 576; *Dawson v. Black*, 148 Ill. 484, 36 N. E. 413; *Downing v. Oskaloosa*, 86 Iowa, 352, 53 N. W. 256; *State v. City Council*, 65 Minn. 298, 68 N. W. 31; *People v. Syracuse*, 59 Hun, 258, 12 N. Y. S. 890; *King Real Estate Association v. Portland*, 23 Ore. 199, 31 Pac. 482; *Merchant v. Marshfield*, 35 Ore. 55, 56 Pac. 1013; *Miles v. Wells*, 22 Utah, 55, 61 Pac. 534; *Harrison v. Wissler*, 98 Va. 597, 36 S. E. 982.

⁹⁰ *Clark v. Schatz*, 24 Minn. 300; *Keller v. Houlihan*, 32 id. 486, 21 N. W. 729; *Gilfillan v. Hobart*, 35 Minn. 185, 28 N. W. 222.

⁹¹ Wilb. on St. 204.

128, that "every vacancy in the burial board *shall* be filled up by the vestry within one month, and in case any such vestry shall neglect to fill up any such vacancy, the vacancy *may* be filled up by the burial board at any meeting thereof." It was held that the word "may" in this provision was not imperative.⁹² By a statute it was provided that in a certain event a bridge should "become a public bridge and *may* be maintained by the county." "This," say the court, "is a direction to a public body (not an option to a private person or corporation), in the execution whereof the inhabitants of that county have a pecuniary interest. In fact the public generally may be said to have such an interest. Where persons or the public have an interest in having the act done by a public body, 'may' in such a statute means 'must.'⁹³ This rule must prevail where there is nothing that would evince a contrary intention in the statute or in the surrounding facts."⁹⁴

The word "shall" in its ordinary sense is imperative. "When the word 'shall' is used in a statute, and a right or benefit to any one depends upon giving it an imperative construction, then that word is to be regarded as peremptory."⁹⁵ But the intent of the act controls, and when the spirit and purpose of the act require the word "shall" to be construed as permissive it will be done.⁹⁶ Thus an act of California provided that on or before February 1st in each year the board of education of the city of Sacramento should furnish to the board of trustees of the city a detailed estimate of the probable amount of money required for school purposes for the current year and that the board of trustees "*shall levy a tax*" sufficient to raise this amount, with a proviso that the school tax should not exceed twenty-five cents on the hun-

⁹² Id ; Reg. v. Overseers of South Weald, 5 B. & S. 391.

⁹³ Newburgh Turn. Co. v. Miller, 5 John. Ch. 113; Malcolm v. Rogers, 5 Cow. 188.

⁹⁴ Phelps v. Hawley, 52 N. Y. 23, 27; Steckert v. East Saginaw, 22

Mich. 104; Spangler v. Jacoby, 14 Ill. 297, 58 Am. Dec. 571; Supervisors v. People, 25 Ill. 181.

⁹⁵ O'Rear v. Crum, 135 Ill. 294, 25 N. E. 1097.

⁹⁶ Boyer v. Onion, 108 Ill. App. 612.

dred dollars. It was held that the statute was not mandatory and that the board of trustees could exercise its discretion as to the amount to be levied for school purposes.⁹⁷ A statute contained a provision that on the failure of the plaintiff to furnish security for costs as ordered by the court his suit "*shall be dismissed.*" It was held that the statute was directory and that the court could extend the time and accept security after the rule had expired.⁹⁸

⁹⁷ Board of Education v. Board of Trustees, 96 Cal. 42, 30 Pac. 838. ⁹⁸ Rosenfeld v. Swarts, 22 R. I. 315, 47 Atl. 690.

CHAPTER XVII.

RETROACTIVE STATUTES.

§ 641 (463). Retroactive statutes regarded with disfavor.—Retrospective statutes relate to past acts and transactions. Retroactive statutes are those which operate on such acts and transactions and change their legal character or effect. Congress, as well as the states, are expressly forbidden by the federal constitution to pass any *ex post facto* law,¹ and the states are forbidden to pass any law impairing the obligation of contracts.² As retrospective laws are generally unjust and in many cases oppressive, they are not looked upon with favor. Says the court in *Montpelier v. Senter*,³ “Retrospective legislation is not favored, and is prohibited by the constitution of some of the states, as being highly injurious, oppressive and unjust; and nowhere will retrospective effect be given to a statute unless it appears that it was the intent of the legislature that it should have such effect.” And the supreme court of Minnesota says: “Again, it is a well settled rule that laws are not to be construed retrospectively, or to have a retrospective effect, unless it shall clearly appear that it was so intended by the enacting body, and unless such construction is absolutely necessary to give meaning to the language used.”⁴

§ 642. Statutes operate prospectively only unless intent clear to the contrary.—The general rule is that statutes will be construed to operate prospectively only, unless an intent to the contrary clearly appears. It is said “that a law will not be given a retrospective operation, unless

¹ Art. I, secs. 9 and 10.

² Id.

³ 72 Vt. 112, 47 Atl. 392.

⁴ *Brown v. Hughes*, 89 Minn. 150, 153, 94 N. W. 438.

that intention has been manifested by the most clear and unequivocal expression.”⁵ And in another case: “The rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction.”⁶ The rule is supported by numerous cases.⁷ The

⁵State v. Kearney, 49 Neb. 337, 339, 70 N. W. 255.

⁶Bauer Grocer Co. v. Zelle, 172 Ill. 407, 50 N. E. 238; Cleary v. Hoobler, 107 Ill. 97.

⁷Barnes v. Mayor, 19 Ala. 707; Ex parte Buckley, 53 Ala. 42; Englehardt v. State, 88 Ala. 100, 7 So. 154; Couch v. McKee, 6 Ark. 484; State v. Wallis, 57 Ark. 64, 20 S. W. 811; Fayetteville B. & L. Ass'n v. Bowlin, 63 Ark. 573, 39 S. W. 1046; State v. McNally, 67 Ark. 580, 55 S. W. 1104; Rankin v. Schofield, 70 Ark. 83, 66 S. W. 197; Pignoz v. Burnett, 119 Cal. 157, 51 Pac. 48; American Refrig. Transfer Co. v. Adams, 28 Colo. 119, 63 Pac. 410; Gardner v. Resumption M. & S. Co., 4 Colo. App. 271, 35 Pac. 674; Goshen v. Stonington, 4 Conn. 225, 209, 10 Am. Dec. 121; Goodsell's Appeal, 55 Conn. 171, 10 Atl. 557; Bowen v. New York, etc. R. R. Co., 59 Conn. 364, 21 Atl. 1073; Wood v. Vernon, 8 Houst. 48, 12 Atl. 656; Friedmann v. McGowan, 1 Penn. (Del.) 436, 42 Atl. 723; Trask v. Wannamaker, 21 D. C. Rep. 119; Sammis v. Bennett, 32 Fla. 458, 14 So. 90, 22 L. R. A. 48; Bond v. Munro, 28 Ga. 597; State v. Bradford, 36 Ga. 422; Jimison v. Adams County, 130 Ill. 558, 22 N. E. 859; Gage v. Nichols, 135 Ill. 128, 25 N. E. 672; People v. McClellan, 137 Ill. 352, 27 N. E. 181; Fisher v. Green, 142 Ill. 80, 31 N. E. 172; American

Loan & T. Co. v. Minn. & N. W. R. R. Co., 157 Ill. 641, 42 N. E. 153; Voight v. Kersten, 164 Ill. 314, 45 N. E. 543; Moore v. Chicago Guaranty Fund L. Soc., 178 Ill. 202, 52 N. E. 882; In re Day, 181 Ill. 73, 54 N. E. 646; Richardson v. U. S. Mortgage & Trust Co., 194 Ill. 259, 62 N. E. 606; McWethy v. Aurora Elec. L. & P. Co., 202 Ill. 218, 67 N. E. 9; Kersten v. Voight, 61 Ill. App. 42; Rock Island National Bank v. Thompson, 74 Ill. App. 54; S. C. affirmed, 173 Ill. 593, 50 N. E. 1089; Porter v. Glenn, 87 Ill. App. 106; Nelson v. Gibson, 92 Ill. App. 595; Halpin v. Prosperity L. & B. Ass'n, 108 Ill. App. 316; Kennedy v. Des Moines, 84 Iowa, 187, 50 N. W. 880; Perkins v. Lyons, 111 Iowa, 192, 82 N. W. 486; Morrison v. Pepperman, 112 Iowa, 471, 84 N. W. 522; Galusha v. Wendt, 114 Iowa, 597, 87 N. W. 512; Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge, 115 Iowa, 568, 89 N. W. 7; Percifield v. Aumick, 116 Iowa, 383, 89 N. W. 1101; Fultz v. Fox, 9 B. Mon. 499; Long v. Louisville, 97 Ky. 364, 30 S. W. 987; Berg v. Berg, 105 Ky. 80, 48 S. W. 432; Nicholson v. Thompson, 5 Rob. (La.) 367; Deyraud's Succession, 9 Rob. (La.) 357; Miller v. Reynolds, 5 Martin (N. S.), 665; Guidy v. Rees, 7 La. 278; State v. Bermudez, 12 La. 352; MacNichol v. Spence, 83 Me. 87, 21 Atl. 748; Dyer v. Belfast, 88 Me. 140, 33 Atl. 790; Kimball v. Masons' Fra-

rule is especially applicable where the statute, if given a retrospective operation, would be invalid, as impairing the

- ternal Acc. Ass'n, 90 Me. 183, 38 Atl. 102; Commonwealth v. Hewitt, 2 H. & M. 181; State v. Norwood, 12 Md. 195; Appeal Tax Court v. Western, etc. R. R. Co., 50 Md. 279; Johnson v. Johnson, 52 Md. 668; In re Lee's Estate, 76 Md. 108, 24 Atl. 422; Wild v. Boston & M. R. Co., 171 Mass. 245, 50 N. E. 533; Humphrey v. Auditor-General, 70 Mich. 292, 38 N. W. 214; Hall v. Perry, 72 Mich. 202, 40 N. W. 324; McNaughton v. Martin, 72 Mich. 276, 40 N. W. 326; Auditor-General v. Board of Supervisors, 76 Mich. 295, 42 N. W. 1101; Shaw v. Morley, 89 Mich. 313, 50 N. W. 993; Haines v. Board of Supervisors, 99 Mich. 32, 57 N. W. 1047; Auditor-General v. Bay County Supervisors, 106 Mich. 662, 64 N. W. 570; Angell v. West Bay City, 117 Mich. 685, 76 N. W. 128; Norris v. Hall, 124 Mich. 170, 82 N. W. 832; Sleight v. Roe, 125 Mich. 585, 85 N. W. 10; Broffee v. Grand Rapids, 127 Mich. 89, 86 N. W. 401; Nowlen v. Hall, 128 Mich. 274, 87 N. W. 222; Green v. Anderson, 39 Miss. 359; Reed v. Swan, 133 Mo. 100, 34 S. W. 483; Shields v. Johnson County, 144 Mo. 76, 47 S. W. 107; State v. Ziegenhein, 144 Mo. 283, 45 S. W. 1099, 66 Am. St. Rep. 420; Clay v. Mayr, 144 Mo. 376, 46 S. W. 157; O'Brien v. Ash, 169 Mo. 283, 69 S. W. 8; Mintner v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Singer Mfg. Co. v. Shull, 74 Mo. App. 486; Monett v. Beaty, 79 Mo. App. 315; Huff v. Woodmen, 85 Mo. App. 96; Ryan v. Maxey, 14 Mont. 81, 35 Pac. 515; State v. Dickerman, 16 Mont. 278, 40 Pac. 698; Bullard v. Smith, 28 Mont. 387; State v. Kearney, 49 Neb. 325, 68 N. W. 533; S. C. affirmed on rehearing, 49 Neb. 337, 70 N. W. 255; McIntosh v. Johnson, 51 Neb. 33, 70 N. W. 522; Commercial Bank v. Eastern Banking Co., 51 Neb. 766, 71 N. W. 1024; Stilphen v. Stilphen, 65 N. H. 126, 23 Atl. 79; Allen v. Bernards Tp., 57 N. J. L. 303, 31 Atl. 219; Matter of Miller, 110 N. Y. 216, 18 N. E. 139; Matter of Cager, 111 N. Y. 343, 18 N. E. 866; Matter of Estate of Van Kleeck, 121 N. Y. 701, 25 N. E. 50; Matter of Scott, 148 N. Y. 588, 42 N. E. 1079; Germania Savings Bank v. Suspension Bridge, 159 N. Y. 362, 54 N. E. 33; Dash v. Van Kleeck, 7 Johns. 508, 5 Am. Dec. 291; McMannis v. Butler, 49 Barb. 176; Hill v. Nye, 17 Hun. 467; Matter of Miller, 47 Hun. 394; Lapham v. Marshall, 51 Hun. 36, 3 N. Y. S. 601; Matter of Prime, 64 Hun. 50, 18 N. Y. S. 603; Matter of Wolfe, 66 Hun. 389, 21 N. Y. S. 515; Foley v. Royal Arcanum, 78 Hun. 222, 28 N. Y. S. 952; O'Reilly v. Utah, Nev. & Cal. Stage Co., 87 Hun. 406, 34 N. Y. S. 358; Roddy v. Brooklyn City, etc. R. R. Co., 32 App. Div. 311, 52 N. Y. S. 1025; Hempstead v. New York, 52 App. Div. 182, 65 N. Y. S. 14; Greer v. Asheville, 114 N. C. 678, 19 S. E. 635; Bank v. Hodgins, 129 N. C. 247, 39 S. E. 959; State v. Staley, 5 Ohio C. C. 602; State v. Cincinnati Tin & Japan Co., 21 Ohio C. C. 218; Seton v. Hoyt, 34 Ore. 266, 55 Pac. 967, 75 Am. St. Rep. 641; Catterlin v. Bush, 39 Ore. 496, 59 Pac. 706, 65

obligation of contracts or interfering with vested rights.⁸
The principle that all statutes are to be so construed, if

Pac. 1064; *Brady v. Wilkes-Barre*, 161 Pa. St. 246, 28 Atl. 1085; *Thomas v. Election*, 198 Pa. St. 546, 48 Atl. 489; *Sproul v. Standard Plate Glass Co.*, 201 Pa. St. 103, 50 Atl. 1003; *Ex parte Graham*, 13 Rich. 277; *Curtis v. Renneker*, 34 S. C. 468, 13 S. E. 664; *Mutual Aid L. & L. Co. v. Logan*, 55 S. C. 294, 33 S. E. 372; *Interstate B. & L. Ass'n v. Powell*, 55 S. C. 316, 33 S. E. 355; *American Invest. Co. v. Thayer*, 7 S. D. 72, 63 N. W. 233; *Taylor v. Rountree*, 15 Lea, 725; *Railroad v. Merrell*, 11 Heisk. 715; *Townsend v. Binner*, 1 Tenn. Cas. 197; *Orr v. Rhine*, 45 Tex. 345; *Life Ins. Co. v. Ray*, 50 Tex. 512; *Bates v. Bratton*, 96 Tex. 279, 72 S. W. 157; *Farrell v. Pingree*, 5 Utah, 443, 16 Pac. 343; *Montpelier v. Senter*, 72 Vt. 112, 47 Atl. 392; *Barber v. Dummerston*, 72 Vt. 330, 47 Atl. 1069; *Wallace v. Taliaferro*, 2 Call, 447; *Elliott's Ex'r v. Lyell*, 3 Call, 268; *Warder v. Arell*, 2 Wash. (Va.) 282, 1 Am. Dec. 489; *Duval v. Malone*, 14 Gratt. 28; *Crigler v. Alexander*, 33 Gratt. 674; *Ryan v. Commonwealth*, 80 Va. 385; *Myers v. Commonwealth*, 90 Va. 785, 20 S. E. 153; *Kesterson v. Hill*, 101 Va. 739; *In re Heilbron's Estate*, 14 Wash. 586, 45 Pac. 153, 35 L. R. A. 602; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572; *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447; *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. 437; *Walker v. Boggess*, 41 W. Va. 588, 23 S. E. 550; *Rogers v. Lynch*, 44

W. Va. 94, 29 S. E. 507; *Castro v. Greer*, 44 W. Va. 332, 30 S. E. 100; *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385; *Pier v. Oneida County*, 102 Wis. 338, 78 N. W. 410; *McNaughton v. Ticknor*, 113 Wis. 555, 89 N. W. 493; *City Ry. Co. v. Citizens' St. R. R. Co.*, 166 U. S. 557, 17 S. C. Rep. 653, 41 L. Ed. 1114; *Southwestern Coal Co. v. McBride*, 185 U. S. 499, 22 S. C. Rep. 763, 46 L. Ed. 1010; *Blanchard v. Sprague*, 3 Sumner, 279; *Fed. Cas. No. 1517*; *McCormick v. Eliot*, 43 Fed. 469; *Fuller v. United States*, 48 Fed. 654; *Sears v. Mahoney*, 66 Fed. 860; *Wright v. Southern Ry. Co.*, 80 Fed. 260; *Webster v. Bowers*, 104 Fed. 627; *Dodge v. Nevada National Bank*, 109 Fed. 726, 48 C. C. A. 626; *In re Scott*, 126 Fed. 981; *Gilmore v. Shuter*, 2 Lev. 227; *Waugh v. Middleton*, 8 Exch. 352; *Marsh v. Higgins*, 9 C. B. 551; *Evans v. Williams, Drew. & Sm.* 324; *Allhusen v. Brook- ing*, L. R. 26 Ch. Div. 564; *Quilter v. Mapleson*, L. R. 9 Q. B. D. 672; *Knight v. Lee*, L. R. (1893) 1 Q. B. 41; *In re School Board Election*, (1894) 1 Q. B. 725; *Queen v. Griffiths*, (1891) 2 Q. B. 145; *In re Chapman*, (1896) 1 Ch. 323.

⁸ *Florence Gas, Elec. Light & P. Co. v. Hanby*, 101 Ala. 15, 13 So. 343; *Cook v. Cockins*, 117 Cal. 140, 48 Pac. 1025; *Smissaert v. Prudential Ins. Co.*, 15 Colo. App. 442, 62 Pac. 967; *Kennedy v. Des Moines*, 84 Iowa, 187, 50 N. W. 880; *Willard v. Sturm*, 96 Iowa, 555, 65 N. W. 847; *Farmers' Co-op. Creamery Co. v. Iowa State Ins. Co.*, 112 Iowa,

possible, as to be valid,⁹ requires that a statute shall never be given a retrospective operation, when to do so would render it unconstitutional, and the words of the statute admit of any other construction. It is always presumed that statutes were intended to operate prospectively,¹⁰ and all doubts are resolved in favor of such a construction.¹¹ These same rules of construction apply to constitutional provisions¹² and to by-laws and ordinances.¹³ A new constitutional provision as to the advanced age which should prevent the incumbents of certain judicial offices from retaining them was held prospective; it did not apply to per-

608, 84 N. W. 904; *Galusha v. Wendt*, 114 Iowa, 597, 87 N. W. 512; *Watkins v. Glenn*, 55 Kan. 417, 40 Pac. 316; *McNichol v. Spence*, 83 Me. 87, 21 Atl. 748; *Garrison v. Hill*, 81 Md. 551, 32 Atl. 191; *Klein v. Bayer*, 81 Mich. 233, 45 N. W. 991; *Lindzey v. State*, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674; *Hodnett v. State*, 66 Miss. 26, 5 So. 518; *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788; *Leete v. State Bank*, 141 Mo. 574, 42 S. W. 1074; *Clay v. Mayr*, 144 Mo. 376, 46 S. W. 157; *Cranor v. School District*, 151 Mo. 119, 52 S. W. 232; *Gladney v. Sydnor*, 172 Mo. 318, 72 S. W. 554; *Walton v. Fudge*, 63 Mo. App. 52; *American B. & L. Ass'n v. Rainbolt*, 48 Neb. 434, 67 N. W. 493; *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379; *King v. Belcher*, 30 S. C. 381, 9 S. E. 359; *Chester & Cheraw R. R. Co. v. Marshall*, 40 S. C. 59, 18 S. E. 247; *Mutual Aid, L. & Invest. Co. v. Logan*, 55 S. C. 294, 33 S. E. 372; *Interstate B. & L. Ass'n v. Powell*, 55 S. C. 316, 33 S. E. 355; *Barton National Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176; *In re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; *Hale v.*

Stenger, 22 Wash. 516, 61 Pac. 156; *Rand v. Hartranft*, 29 Wash. 591, 70 Pac. 77; *Castro v. Greer*, 44 W. Va. 332, 30 S. E. 100; *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385; *Ryan v. C. & N. W. Ry. Co.*, 101 Wis. 506, 77 N. W. 894; *McNaughton v. Ticknor*, 113 Wis. 555, 89 N. W. 493; *Anheuser-Busch Brewing Ass'n v. Bond*, 66 Fed. 653, 13 C. C. A. 665, 32 U. S. App. 38; *The Queen*, 93 Fed. 834.

⁹ *Ante*, § 83.

¹⁰ *City Railway Co. v. Citizens' St. R. R. Co.*, 166 U. S. 557, 17 S. C. Rep. 653, 41 L. Ed. 1114.

¹¹ *In re Day*, 181 Ill. 73, 54 N. E. 646.

¹² *Pecot v. Police Jury*, 41 La. Ann. 706, 6 So. 677; *State v. St. Joseph's Convent of Mercy*, 116 Mo. 575, 22 S. W. 811; *State v. Kenney*, 11 Mont. 553, 29 Pac. 89; *Cutting v. Taylor*, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691; *Brown v. Hughes*, 89 Minn. 150, 94 N. W. 438.

¹³ *Sovereign Camp Woodmen v. Thornton*, 115 Ga. 798, 42 S. E. 236; *Mills v. Charleston*, 60 S. C. 1, 38 S. E. 226; *Modern Woodmen v. Wieland*, 109 Ill. App. 340.

sons in office at the time of its taking effect. An officer was elected under the old constitution by the provisions of which he was eligible; a new constitutional provision took effect on the same day, which was the first day of the official term; he was held in office so as to be within the exemption. It was held also that it was not intended by the new judiciary article to overthrow or disturb what had been lawfully done under and in pursuance of the constitution and laws previously existing.¹⁴

§ 643 (464). Same — Illustrations.— A statute should not receive such construction as to make it impair existing rights, create new obligations, impose new duties in respect of past transactions, unless such plainly appear to be the intention of the legislature.¹⁵ In the absence of such plain expression of design, it should be construed as prospective only, although its words are broad enough in their literal extent to comprehend existing cases.¹⁶ Although there is no vested right in an office which may not be disturbed by legislative enactment, yet to take away the right thereto the terms of the statute in which the purpose is stated must be clear.¹⁷ Acts changing the term of office¹⁸ or compensation of public officers¹⁹ were held not to apply to those in office. But where a mayor was elected under a law which forbade his receiving any compensation, and during his term the charter was amended so as to give him a salary of \$300 a year, it was held that he was entitled to the *pro rata* amount for the unexpired part of the term, but not to the

¹⁴ *People v. Gardner*, 59 Barb. 198.

¹⁵ *Green v. Anderson*, 39 Miss. 359.

¹⁶ *Crigler v. Alexander*, 33 Gratt. 674; *Campbell, etc. Co. v. Nonpareil, etc. Co.*; 75 Va. 291; *Moon v. Durden*, 2 Exch. 22; *Dash v. Van Kleeck*, 7 John. 477, 5 Am. Dec. 291; *Wood v. Oakley*, 11 Paige, 400; *Johnson v. Burrell*, 2 Hill, 238; *Butler v. Palmer*, 1 Hill, 324; *Snyder v. Snyder*, 3 Barb. 621; *Hackley*

v. Sprague, 10 Wend. 114; *McManis v. Butler*, 49 Barb. 176; *In re Application of Prot. Ep. School*, 58 Barb. 161.

¹⁷ *People v. Green*, 58 N. Y. 295.

¹⁸ *Greer v. Asheville*, 114 N. C. 678, 19 S. E. 635; *Farrel v. Pingree*, 5 Utah, 443, 16 Pac. 343.

¹⁹ *Jimison v. Adams County*, 130 Ill. 558, 22 N. E. 859.

whole year's salary.²⁰ An act requiring clerks of court and sheriffs, at the expiration of their terms of office, to pay to the county treasurer all costs and fees collected and remaining in their hands, with a statement of the names of the persons entitled thereto and the amount due each; was held not to apply with respect to fees and costs collected before the act went into effect.²¹

A statute relative to fires set by locomotives does not apply to fires occurring before the act took effect.²² A statute making defects in a car or locomotive *prima facie* evidence of negligence in a suit by an employee for damages was held not to apply in case of past accidents.²³ Where an act made provision for a pension for policemen who shall serve twenty years, it was held to apply only where the twenty years' service was after the passage of the act.²⁴ An act limiting the lien of special assessments to five years does not apply to past assessments.²⁵ A statute changing the distribution of damages for death by negligence applies only to claims thereafter arising.²⁶ Where a medical practice act was amended so as to make a new requirement as a condition to practice, the amendment was held not to apply to those who had complied with the former law.²⁷ A statute provided that a party or witness examined in a special proceeding, supplementary to execution, should not be excused from answering any question on the ground of self-incrimination, and that the answer should not be used as evidence in any civil or criminal action. After a witness had given her testimony the law was changed so as to omit

²⁰ *Montpelier v. Senter*, 72 Vt. 112, 47 Atl. 392. 283, 45 S. W. 1099, 66 Am. St. Rep. 420.

²¹ *People v. McClellan*, 137 Ill. 352, 27 N. E. 181.

²² *Wild v. Boston & M. R. R. Co.*, 171 Mass. 245, 50 N. E. 533.

²³ *Cincinnati, H. & D. R. R. Co. v. Hedges*, 63 Ohio St. 339, 58 N. E. 804.

²⁴ *State v. Ziegenhein*, 144 Mo.

²⁵ *Walker v. People*, 202 Ill. 34, 66 N. E. 827; *McCartney v. People*, 203 Ill. 51, 66 N. E. 873.

²⁶ *Berg v. Berg*, 105 Ky. 80, 48 S. W. 432.

²⁷ *Driscoll v. Commonwealth*, 93 Ky. 393, 20 S. W. 431.

civil actions from the exemption. It was held that the witness was still entitled to the protection afforded by the old law.²⁸ A new code for the District of Columbia went into effect January 1, 1902, and former laws were repealed. It was held that a grand jury summoned before January 1st under the old law could not be impaneled after January 1st under the new law. On January 8th congress passed a joint resolution providing that all grand and petit jurors drawn under the old law should serve out their terms under that law. The resolution was held to operate prospectively only and not to validate an indictment found between January 1st and January 8th.²⁹ Some additional cases are referred to in the margin in which the acts in question were held to operate only upon the appropriate facts and conditions arising after the passage of the act.³⁰

§ 644. Same — Acts relating to husband and wife.— Acts enlarging the rights and powers of married women with respect to their separate property are held not to apply to property previously acquired, so as to affect the husband's rights therein.³¹ An act debarring the husband from selling, mortgaging or alienating the homestead was held not

²⁸ *Lapham v. Marshall*, 51 Hun, 36, 3 N. Y. S. 601. The court says: "The provision of the statute which was repealed was as sacred as the one which remained in effect, and it would be unjust to the witness not to give her the full benefit of the promise made by the legislature, when she gave her evidence, and we think that no such effect should be given to the amendment."

²⁹ *Clark v. United States*, 19 App. Cas. (D. C.) 295.

³⁰ *Cook v. Cockins*, 117 Cal. 140, 48 Pac. 1025; *McWethy v. Aurora Elec. Lt. & P. Co.*, 202 Ill. 218, 67 N. E. 9; *Rock Island National Bank*

v. Thompson, 74 Ill. App. 54; S. C. affirmed, 173 Ill. 593, 50 N. E. 1089; *Halpin v. Prosperity L. & B. Ass'n*, 108 Ill. App. 316; *Monett v. Beaty*, 79 Mo. App. 315; *Matter of Scott*, 148 N. Y. 588, 42 N. E. 1079; *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50.

³¹ *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788; *Leete v. State Bank*, 141 Mo. 574, 42 S. W. 1074; *Clay v. Mayr*, 144 Mo. 376, 46 S. W. 157; *Graves v. Wood*, 87 Mo. App. 92; *Allen v. Colburn*, 65 N. H. 37, 17 Atl. 1060, 23 Am. St. Rep. 20. Compare *Gleaton v. Gibson*, 29 S. C. 514, 7 S. E. 833.

to apply to homesteads previously acquired.³² So of an act limiting the right of the husband to control and convey community property without the consent of the wife.³³ An act empowering a married woman, under certain conditions, to sue in her own name "for the redress of her personal wrongs," was held not to apply to wrongs committed before the act was passed.³⁴ So an act providing that married women might sue and be sued as if sole, and making a judgment in any such suit a lien upon her real estate, was held not to apply in case of prior contracts.³⁵ A statute making the expenses of the family chargeable to both husband and wife does not apply to debts contracted before the enactment.³⁶

§ 645. Same — Acts relating to taxation. — A general law required property to be assessed to the person who is owner at noon on the first Monday of March. An act passed March 14, 1899, provided for the taxation of property not before taxable. It was held that the act could not be given a retroactive effect so as to warrant the assessment of such property for the year 1899.³⁷ So, where an act passed on June 15th exempted certain property from taxation, it was held not to apply to an assessment required to be made as of May 1st of the same year, though the tax had not been extended when the act was passed.³⁸ An act that no error or informality in the proceedings for the assessment, levying or collecting of a tax, not affecting its substantial justice, should vitiate the tax was held not to apply to taxes previously levied.³⁹ So a new act for the assessment of property and the levy and collection of taxes thereon was held

³² Gladney v. Sydnor, 172 Mo. 318, 72 S. W. 554.

³³ Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497.

³⁴ Wood v. Vernon, 8 Houst. 48, 12 Atl. 656.

³⁵ Rogers v. Lynch, 44 W. Va. 94, 29 S. E. 507.

³⁶ Kelly v. Canon, 6 Colo. App. 465, 41 Pac. 833.

³⁷ Dodge v. Nevada National Bank, 109 Fed. 726, 48 C. C. A. 626.

³⁸ Aetna Ins. Co. v. New York, 153 N. Y. 331, 47 N. E. 593.

³⁹ Gage v. Nichols, 135 Ill. 128, 25 N. E. 672.

not to apply to past taxes or their enforcement.⁴⁰ An act exempting adopted children from the payment of an inheritance tax was held not to apply in case of the estates of persons who died before the act was passed.⁴¹ And generally a law imposing or charging an inheritance tax does not retroact so as to affect estates already in existence.⁴² An act in regard to the refunding of money paid at void tax sales was held not to apply to past sales;⁴³ but such an act may be made to apply to past sales.⁴⁴ An act making counties liable for the defaults of county treasurers in respect of taxes was held to operate prospectively only.⁴⁵ A statute authorizing a suit for the taxes on property withheld or omitted from taxation, at any time within five years from the time it should have been assessed, was held to be remedial and to apply to past cases.⁴⁶ But the same statute in so far as it provided for penalties for the non-payment of taxes was held not to operate upon past taxes.⁴⁷ But on the latter point the cases do not seem to be uniform and statutes in regard to the interest and penalties on delinquent taxes have been held to operate on taxes previously levied;⁴⁸ also a

⁴⁰ *Hanaphrey v. Auditor-General*, 70 Mich. 292, 38 N. W. 212; *Hall v. Ferry*, 72 Mich. 202, 40 N. W. 324; *McNaughton v. Martin*, 72 Mich. 273, 40 N. W. 326; *Auditor-General v. Bay County Supervisor*, 106 Mich. 662, 64 N. W. 570; *Norris v. Hall*, 124 Mich. 170, 82 N. W. 832; *Sleight v. Roe*, 125 Mich. 585, 85 N. W. 10; *Nowlen v. Hall*, 128 Mich. 274, 87 N. W. 222.

⁴¹ *Matter of Miller*, 110 N. Y. 216, 18 N. E. 139; *Matter of Cager*, 111 N. Y. 343, 18 N. E. 866; *Matter of Miller*, 47 Hun, 394; *Matter of Kemeys*, 56 Hun, 117, 9 N. Y. S. 132; *Matter of Prime*, 64 Hun, 50, 18 N. Y. S. 603; S. C. affirmed, 136 N. Y. 347, 32 N. E. 1091; *Matter of Wolfe*, 66 Hun, 389, 21 N. Y. S. 515.

⁴² *Harriott v. Potter*, 115 Iowa, 648, 89 N. W. 91; *Matter of Van Kleeck*, 121 N. Y. 701, 25 N. E. 50.

⁴³ *American Invest. Co. v. Thayer*, 7 S. D. 72, 63 N. W. 233; *Pier v. Oneida County*, 102 Wis. 338, 78 N. W. 410.

⁴⁴ *Schoonover v. Galarnault*, 45 Minn. 174, 47 N. W. 654.

⁴⁵ *Auditor-General v. Board of Supervisors*, 76 Mich. 295, 42 N. W. 1101.

⁴⁶ *Galusha v. Wendt*, 114 Iowa, 597, 87 N. W. 512.

⁴⁷ *Id.*

⁴⁸ *Webster v. Auditor-General*, 131 Mich. 668, 80 N. W. 705; *New Whatcom v. Roeder*, 22 Wash. 570, 61 Pac. 767.

statute changing the mode of advertising a tax sale.⁴⁹ At the time a drainage tax was levied the law permitted such a tax, if paid, to be recovered back on proof that the property was not benefited. Afterwards the law was changed so as to render such proof incompetent. The new law was held to apply in a suit to recover back the tax, commenced after the passage of the law.⁵⁰

§ 646. Same — Miscellaneous cases.— An act dispensing with the necessity of taking exceptions at the trial does not apply to past trials, so as to enable a party to take advantage of errors not excepted to.⁵¹ An act giving a right of redemption from foreclosure sales in chancery was held not to apply to sales under decrees theretofore made.⁵² An act modifying the common-law doctrine in regard to the negligence of fellow-servants was held not to apply to past accidents.⁵³ An act giving one, who suffers certain damages inflicted by dogs, a right to recover therefor against the town does not apply in case of past damages.⁵⁴ A statute provided that "a judgment, except for malicious prosecution, libel, slander, or injury to the person, shall bear legal interest from its date." The statute was amended by striking out the exception. It was held that the amendment did not affect a personal injury judgment previously rendered and afterwards affirmed in the supreme court.⁵⁵ A statute requiring notice to the city of the time, place and particulars of an accident by reason of a defective street or walk, as a condition of liability, was held not to apply in case of prior accidents.⁵⁶ A statute respecting the title of

⁴⁹ *Du Bignon v. Brunswick*, 106 Ga. 317, 32 S. E. 102.

⁵⁰ *Allerton v. Monona County*, 111 Iowa, 560, 82 N. W. 922. To same effect, *Oliver v. Morton County*, 117 Iowa, 48, 90 N. W. 510.

⁵¹ *Lobdell v. Keene*, 85 Minn. 90, 88 N. W. 426.

⁵² *Michigan Trust Co. v. Libby*, 127 Mich. 45, 86 N. W. 394.

⁵³ *Wright v. Southern Ry. Co.*, 80 Fed. 260.

⁵⁴ *Barber v. Dummerston*, 72 Vt. 330, 47 Atl. 1069.

⁵⁵ *Louisville & N. R. R. Co. v. Sharp*, 91 Ky. 411, 16 S. W. 86.

⁵⁶ *Kennedy v. Des Moines*, 84 Iowa, 187, 50 N. W. 880; *Angell v. West Bay City*, 117 Mich. 685, 76 N. W. 128; *Broffee v. Grand Rapids*,

personal property, requiring the deeds thereof to be recorded in the county where the property is, was held not to apply to conveyances of such property made prior to the passage of the act.⁵⁷ A statute provided that every will devising or purporting to devise all the testator's real estate shall be construed to pass all the real estate which he was entitled to devise at the time of his death. It was held to be prospective merely and did not operate on wills previously executed, though the testator died after its enactment. Thus, the power of sale in such a will did not embrace lands acquired after the will was executed. It was enacted expressly in the same statute that it should not affect the construction of any will previously made.⁵⁸ An act provided that marriage or the birth of a child should operate to revoke a will previously made. It was held that the statute did not apply where the marriage or birth occurred before the act was passed, though the testator died afterwards.⁵⁹ Acts reducing the time within which to take an appeal,⁶⁰ or relating to the manner of taking appeals, were held not to apply to judgments previously rendered.⁶¹ A statute provided that when any person aggrieved by an award of damages for land taken honestly intended to appeal therefrom and had, by accident or mistake, omitted to do so, he might, at any time within six months after the expiration of the time for appeal, apply to a judge of the superior court for leave to appeal, and that such judge, after notice and hearing, might grant such appeal. It was held that the statute did not apply to a case where the right of appeal was barred before the act took effect.⁶²

127 Mich. 89, 86 N. W. 401. Compare *Reed v. Madison*, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733; *Ryan v. C. & N. W. Ry. Co.*, 101 Wis. 506, 77 N. W. 894.

⁵⁷ *Palmer v. Cross*, 1 Sm. & M. 48.

⁵⁸ *Green v. Dikeman*, 18 Barb. 535; *Parker v. Bogardus*, 5 N. Y. 309.

⁵⁹ *Goodsell's Appeal*, 55 Conn. 171, 10 Atl. 557.

⁶⁰ *Pignoz v. Burnett*, 119 Cal. 157, 51 Pac. 48.

⁶¹ *Sammis v. Bennett*, 32 Fla. 458, 14 So. 90, 22 L. R. A. 48; *Catterlin v. Bush*, 39 Ore. 496, 59 Pac. 706, 65 Pac. 1064.

⁶² *Dyer v. Belfast*, 88 Me. 140, 33 Atl. 790. See *Danforth v. Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495; *post*, § 708.

The repeal of a statute giving jurisdiction takes away the right to proceed in pending cases.⁶³ Section 711 of the Revised Statutes of the United States, which provides that the jurisdiction of the federal courts shall be exclusive of the courts of the several states as to all matters and proceedings in bankruptcy, was held not to affect a creditor's bill filed in a state court before the Revised Statutes were adopted.⁶⁴ An act which extended for four years the time in which a magistrate's execution may be levied without renewal was held to be prospective and not to embrace executions which were issued before it was passed.⁶⁵

§ 647. Retrospective statutes not necessarily invalid. In the absence of constitutional provisions forbidding retrospective or retroactive legislation, such laws are not invalid, unless they interfere with contracts or vested rights, or come under the head of *ex post facto* laws.⁶⁶ Law relating to the remedy only may be retroactive and are often so construed.⁶⁷ A statute provided that where a plank road or any portion thereof shall have been abandoned, or the

⁶³ Butler v. Palmer, 1 Hill, 324; Assessor v. Osbornes, 9 Wall. 567, 19 L. Ed. 748; McCardle, Ex parte, 7 Wall. 506, 19 L. Ed. 264; Baltimore, etc. R. R. Co. v. Grant, 98 U. S. 398, 25 L. Ed. 231; South Carolina v. Gaillard, 101 U. S. 433, 25 L. Ed. 937; North Canal St. Road, 10 Watts, 351, 86 Am. Dec. 185; Fene- lon's Petition, 7 Pa. St. 173; Hamp- ton v. Commonwealth, 19 id. 329; Uwehlan T. Road, 30 id. 156; Illi- nois, etc. Canal v. Chicago, 14 Ill. 334; Macnawhoc Plantation v. Thompson, 36 Me. 365; Lamb v. Schottler, 54 Cal. 319; Smith v. Dist. Court, 4 Colo. 235; Hunt v. Jennings, 5 Blackf. 195; Fairchild v. United States, 91 Fed. 297.

⁶⁴ Davis v. Lumpkin, 57 Miss. 506. See Farris v. Houston, 78 Ala. 250;

Gholston v. Gholston, 54 Ga. 285; McCool v. Smith, 1 Black, 459, 17 L. Ed. 218.

⁶⁵ Briggs v. Cottrell, 4 Strob. 86.

⁶⁶ State v. Norwood, 12 Md. 195; Barrett v. Barrett, 120 N. C. 127, 26 S. E. 691, 36 L. R. A. 226; Henry v. Henry, 31 S. C. 2, 9 S. E. 726; Swayne v. Terrell, 20 Tex. Civ. App. 31, 48 S. W. 218.

⁶⁷ Moore v. Ripley, 106 Ga. 556, 32 S. E. 647; Tompkins v. Forrestal, 54 Minn. 119, 55 N. W. 813; Anderson v. Seymour, 70 Minn. 358, 73 N. W. 171; Persons v. Gardner, 43 App. Div. 490, 59 N. Y. S. 463; Tutwiler v. Tuskaloosa Coal, Iron & Land Co., 89 Ala. 391, 7 So. 398, 18 Am. St. Rep. 116; Goodbub v. Estate of Hornung, 127 Ind. 181, 26 N. E. 770.

owners thereof neglect to make repairs and collect toll for a period of sixty days, such road or portion of road should be deemed a public highway. The statute was held to apply to a case in which the abandonment occurred before the act was passed.⁶⁸ An act imposing certain penalties upon a tenant who wrongfully continues, in possession was held to apply in case of existing leases.⁶⁹ An act prohibiting the giving away of food to be eaten on the premises where liquor is sold applies to those who already have a license to sell liquors.⁷⁰ Under a statute making the homestead subject to a lien for repairs and improvements, it was held that a lien could be filed for materials furnished before the act was passed.⁷¹ A statute provided that when any person "shall die intestate" and administration shall not have been granted on his estate, any heir or grantee of decedent may, after five years, institute proceedings to have lands left by the decedent assigned to those entitled thereto. The act was held to apply in case of those who died before the act.⁷² Some further illustrations are cited in the margin.⁷³ Statutes which are made retrospective are, as a rule, strictly construed.⁷⁴

§ 648. Constitutional provisions forbidding retrospective or retroactive laws.—The constitution of Ohio provides that "the general assembly shall have no power to

⁶⁸ *State v. Duff*, 80 Wis. 13, 49 N. W. 23.

⁶⁹ *Woodward v. Winehill*, 14 Wash. 394, 44 Pac. 860.

⁷⁰ *People v. Warden*, 6 App. Div. 520, 39 N. Y. S. 582.

⁷¹ *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860.

⁷² *Fitzpatrick v. Simonson Mfg. Co.*, 86 Minn. 140, 90 N. W. 378.

⁷³ *Miller v. Davis*, 106 Mich. 300, 64 N. W. 838; *Jamison v. Ramsey*, 128 Mich. 315, 87 N. W. 260; *Barker v. Jerico Springs*, 39 Mo. App. 288;

Litson v. Smith, 68 Mo. App. 397; *Vansandt v. Hobbs*, 84 Mo. App. 628; *Hardy v. Gage*, 66 N. H. 552, 22 Atl. 557; *People v. Coyle*, 55 App. Div. 223, 66 N. Y. S. 827; *State v. Welsh*, 65 Vt. 50, 25 Atl. 900; *Willets v. Jeffries*, 5 Kan. 470.

⁷⁴ *Hedger v. Renmaker*, 3 Met. (Ky.) 255; *Couch v. Jeffries*, 4 Burr. 2460; *Moon v. Durden*, 2 Ex. 22; *Edmonds v. Lawley*, 6 M. & W. 285; *McCowan v. Davidson*, 43 Ga. 480; *Modern Woodmen v. Wieland*, 109 Ill. App. 340.

pass retroactive laws.”⁷⁵ A law authorizing county commissioners to levy an increased tax for turnpike roads and made applicable in case of roads theretofore laid out was held to violate this provision of the constitution.⁷⁶ So of a law requiring counties to refund certain taxes which had been erroneously assessed.⁷⁷ An act requiring a county to pay certain bonds which it had issued under a void act for the purpose of building an armory was held by the federal court not to be retroactive nor in violation of the constitution.⁷⁸

The constitution of Colorado forbids the passage of any law “retrospective in its operation.”⁷⁹ An act which provided that where a sewer assessment has been declared invalid the cost may be re-assessed against the lots which have not paid the assessment was held to be retrospective and violative of the constitution.⁸⁰ At the time a petition was filed to annex the town of F. to Denver the law only required an affirmative vote of the town to be annexed. After an election had been ordered the law was amended so as to require also the consent of the city by ordinance in order to accomplish the annexation. The amendment was held to apply to the pending proceeding, and, as so applied, it was held not to be retrospective. The court says that “A law is retrospective in its legal sense which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.”⁸¹

The constitution of Montana provides that “the general assembly shall pass no law for the benefit of any railroad

⁷⁵ Art. 2, § 28.

Fed. 123, 45 C. C. A. 233, reversing

⁷⁶ *Miller v. Hixon*, 64 Ohio St. 39,
59 N. E. 749.

99 Fed. 846.

⁷⁹ Art. 2, sec. 11.

⁷⁷ *Commissioners v. Rosche*, 50
Ohio St. 103, 33 N. E. 408, 40 Am.
St. Rep. 653.

⁸⁰ *Evans v. Denver*, 26 Colo. 193,
57 Pac. 696.

⁷⁸ *New York Life Ins. Co. v. Cuy-*
ahoga County Commissioners, 106

⁸¹ *Perry v. Denver*, 27 Colo. 93, 59
Pac. 747. See also *Brown v. Chal-*
lis, 23 Colo. 145, 46 Pac. 679.

or other corporation, or any individual or association of individuals, retrospective in its operation.”⁸² A statute provided that a foreign corporation should file certain statements and certificates before doing business in the state and declared that all acts and contracts done or made by it while in default should be void as to the corporation. An amendatory act provided that any such corporation, being in default, might, within ninety days of the going into effect of the act, comply with the former statute, and thereupon all its acts and contracts, done and made before the act took effect, should be valid and enforceable. In a suit to foreclose a mortgage that had been thus validated the curative act was held valid. The court says: “But, in our opinion, section 1034 is not a retrospective law in the sense in which the term is used in the constitutional clause quoted. It is not an inhibition against general retrospective legislation enabling corporations which have made contracts without first observing certain legal formalities to enforce such contracts. It does not prevent the enactment of valid curative statutes. Under its terms no special retrospective laws can be passed for the benefit of a corporation, nor can any law be enacted making a contract or obligation where none existed; but, if a contract has been entered into between a citizen of the state and a foreign corporation, and the citizen has been possessed of a legal right to avoid it because of a defect of proceeding on the part of the corporation, which right, in violation of good conscience, the citizen unjustly insists upon, it never was the design of the constitution to protect such a right by taking away from the legislature the power to pass a healing act which deprives the citizens of that right.”⁸³

An act making a moral obligation against a county to pay for certain services a legal obligation was held not to violate a constitutional provision against retrospective legislation.⁸⁴

⁸² Art. 15, sec. 13.

⁸⁴ *Inlow v. Graham County*, 6.

⁸³ *Mutual Benefit Life Ins. Co. v. Kan. App.* 391, 51 Pac. 65.
Winne, 20 Mont. 20, 37, 49 Pac. 446.

§ 649 (465). **Ex post facto laws — Definition.**— An authoritative exposition of *ex post facto* laws was given in an early case by the supreme court of the United States.⁸⁵ Chase, J., said: “The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this: That the legislatures of the several states shall not pass laws after a fact done by a subject or citizen which shall have relation to such fact and shall punish him for having done it. . . . I do not think it was inserted to secure the citizen in his private rights of either property or contracts. . . . I will state what laws I consider *ex post facto* laws within the words and the intent of the prohibition: 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion or of pardon. They are certainly retrospective and literally, both concern-

⁸⁵ *Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648.

ing and after the facts committed. But I do not consider any law *ex post facto* within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime or increase the punishment, or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime." This construction of the constitutional prohibition has been repeatedly affirmed in later cases.⁸⁶ It is settled that the term applies only to criminal and penal cases, and was not intended to prevent retrospective legislation affecting civil rights of persons or property.⁸⁷

§ 650 (466). Any law is an *ex post facto* law within the meaning of the constitution if passed after the commission of a crime charged against a defendant, which, in relation

⁸⁶ Fletcher v. Peck, 6 Cranch, 87, 138, 3 L. Ed. 162; Watson v. Mercer, 8 Pet. 88, 8 L. Ed. 876; Carpenter v. Pennsylvania, 17 How. 456, 15 L. Ed. 127; Cummings v. Missouri, 4 Wall. 277, 326, 18 L. Ed. 356; Kring v. Missouri, 107 U. S. 221, 2 S. C. Rep. 443, 27 L. Ed. 506. See also the following decisions of state courts: Wilson v. Ohio, etc. Ry. Co., 64 Ill. 542, 16 Am. Rep. 565; Beard v. State, 74 Md. 130, 21 Atl. 700; Hempstead v. New York, 52 App. Div. 182, 65 N. Y. S. 14; Blackburn v. State, 50 Ohio St. 428, 36 N. E. 18; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572; Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St.

Rep. 728, 1 L. R. A. 632; People v. McDonald, 5 Wyo. 526, 42 Pac. 15; Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380.

⁸⁷ Watson v. Mercer, 8 Pet. 88, 8 L. Ed. 876; Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162; Ogden v. Saunders, 12 Wheat. 266, 6 L. Ed. 606; Satterlee v. Matthewson, 2 Pet. 380, 7 L. Ed. 458; McCowan v. Davidson, 43 Ga. 480; Ex parte Garland, 4 Wall. 390, 18 L. Ed. 366; Kring v. Missouri, 107 U. S. 221, 2 S. C. 443, 27 L. Ed. 506; Calder v. Bull, 3 Dall. 386, 390, 1 L. Ed. 648; De Pass v. Bidwell, 124 Fed. 615.

to that offense or its consequences, alters the situation of the party to his disadvantage.⁸⁸ In *People v. Hayes*⁸⁹ the court says: "The *ex post facto* law was regarded as a law which provided for the infliction of punishment upon a person for an act done, which when it was committed was innocent. Enlarging upon this definition as being of the same species and coming within the same principle, a law which aggravated a crime or made it greater than it was when committed, or one which changed the punishment or inflicted a greater punishment than the law annexed to the crime when committed, or a law which changed the rules of evidence and received less or different testimony than was required at the time of the commission of the crime, in order to convict the offender, was included in the definition of an *ex post facto* law."

§ 651 (467). Acts relating to procedure only — General principles.— A statute relating to procedure is not for that reason beyond the reach of the constitutional inhibition of *ex post facto* laws. So long as subsequent laws do not have the effect to deprive a defendant of any substantial right which he had touching his defense as the law stood when the offense was committed, nor alter his situation in relation to the offense or its consequences to his disadvantage, they are not *ex post facto* within the meaning of that inhibition.⁹⁰ A. was convicted of murder in the first degree, in Missouri, and the judgment of condemnation was affirmed by the supreme court of the state. A previous

⁸⁸ *Kring v. Missouri*, 107 U. S. 221, 2 S. C. Rep. 443, 27 L. Ed. 506; *Wilson v. Ohio*, etc. R. R. Co., 64 Ill. 542, 16 Am. Rep. 565; *United States v. Hall*, 2 Wash. 366; *Hopt v. Utah*, 110 U. S. 574, 4 S. C. Rep. 202, 28 L. Ed. 262; *Medley*, *In re*, 134 U. S. 160, 10 S. C. Rep. 384, 33 L. Ed. 835; *Hempstead v. New York*, 52 App. Div. 182, 65 N. Y. S. 14.

⁸⁹ 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572.

⁹⁰ *Kring v. Missouri*, 107 U. S. 221, 27 L. Ed. 506; *Hopt v. Utah*, 110 U. S. 574, 4 S. C. Rep. 202, 28 L. Ed. 262; *In re Medley*, 134 U. S. 160, 10 S. C. Rep. 384, 33 L. Ed. 835; *Wilson v. Ohio*, etc. Ry. Co., 64 Ill. 542, 16 Am. Rep. 565; *Cooley*, C. L. 329, 330; *Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; *McKennon v. State*, 42 Tex. Crim. Rep. 371, 60 S. W. 41.

sentence pronounced on his plea of guilty of murder in the second degree, and subjecting him to imprisonment for twenty-five years, had on his own appeal been reversed. By the law of that state in force when the homicide was committed, this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed, so that by force of its provisions if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime. It was held that as to this case the new law was an *ex post facto* law within the meaning of section 10, article I, of the constitution of the United States, and that he could not be again tried for murder in the first degree. Mr. Justice Miller, delivering the opinion of the court, said: "The constitution of Missouri so changes the rule of evidence that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment; for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction."

In another part of his opinion the learned justice said: "It cannot be sustained, without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crime, is not an *ex post facto* law, if it comes within either of these comprehensive branches of the law designated as pleading, practice and evidence. Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not held to be *ex post facto*, because it relates to procedure?" . . . "And can any substantial right which the law gave the de-

fendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." After reviewing the course of decision upon the associated clause prohibiting state legislation impairing the obligation of contracts, he continues: "Why is not the right to life and liberty as sacred as the right growing out of a contract? Why should not the contiguous and associated words in the constitution relating to retroactive laws on these two subjects be governed by the same rule of construction? And why should a law, equally injurious to rights of the party concerned, be under the same circumstances void in one case and not in the other?"

The point is noticed that when the accused pleaded guilty of murder in the second degree the new constitution was in force, which altered the effect of conviction for the lesser degree of the offense by declaring that it should not be an acquittal of a higher degree. The answer was: "Whether it is *ex post facto* or not relates to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense it as to that *ex post facto*, though whether of the class forbidden by the constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character."⁹¹ This decision is of the greatest importance in its bearing upon the effect of retrospective laws relating to procedure. Such laws must be tried by the test which is enunciated in that case. Any retroactive law, though relating to procedure, which deprives the prisoner of any substantial right that he would have by the law as it stood at the time when

⁹¹ *Kring v. Missouri*, 107 U. S. 221, 2 S. C. Rep. 443, 27 L. Ed. 506.

the imputed offense was committed, or which as to that offense or its consequences alters his situation to his disadvantage, is an *ex post facto* law, within the constitutional prohibition.⁹²

§ 652. Particular acts held to be *ex post facto*.—In two cases which originated in Missouri the supreme court of the United States held that a law which excluded a minister of the gospel from the exercise of his clerical function and a lawyer from practice in the courts unless each would take an oath that he had not engaged in, or encouraged armed hostilities against the government of the United States was an *ex post facto* law because it punished, in a manner not before punished by law, offenses committed before its passage, and because it instituted a new rule of evidence in aid of conviction.⁹³ A statute which provided that "every surveyor who shall have wilfully and knowingly violated the instructions of the surveyor-general in not marking out the boundaries of lands formerly granted, and which are within surveys by him or them made," should be criminally prosecuted, was held *ex post facto*.⁹⁴ A statute which purports to authorize the prosecution, trial and punishment of a person for an offense previously committed, and as to which all prosecution, trial and punishment were, at the time of its passage, already barred according to the pre-existing statute of limitations, is unconstitutional and void.⁹⁵ The repeal of a general statute of amnesty is *ex post facto* as to offenses previously committed.⁹⁶

§ 653 (468). Particular acts held not to be *ex post facto*.—A statute rendering ineligible as a voter or officeholder any person who teaches or practices polygamy or belongs to an association encouraging such practice, or any

⁹² Cooley, Const. Lim. 330.

⁹³ Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356; Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

⁹⁴ State v. Solomons, 3 Hill (S. C.), 96.

⁹⁵ Moore v. State, 43 N. J. L. 203.

See State v. Sneed, 25 Tex. (Supp.) 66; State v. Keith, 63 N. C. 140; Hartung v. People, 26 N. Y. 167; Yeaton v. United States, 5 Cr. 281, 3 L. Ed. 101; In re Murphy, 1 Woolw. 141, Fed. Cas. No. 9947.

⁹⁶ State v. Keith, 63 N. C. 140.

other crime, and providing for a test oath, is not an *ex post facto* law.⁹⁷ A statute provided that no one should practice medicine "who has ever been convicted of felony by any court." It was held to apply to those who had been convicted before the act was passed and that as so applied it was not an *ex post facto* law.⁹⁸ The legislature may impose conditions on which persons may practice medicine and the possession of a good moral character is a proper condition. The statute in question was held to create a new offense dependent upon acts thereafter committed, namely, the continued practice of medicine, and to punish such acts. A statute imposing a penalty for violating an injunction against selling liquor without a license is not *ex post facto*, as applied in case of an injunction thereafter granted, though in a suit begun before the passage of the act.⁹⁹ By the organic act of Oklahoma the criminal code of Nebraska was extended to the territory and was to continue in force until the adjournment of the first legislative assembly. The first assembly continued it in force as to all prosecutions pending and all offenses committed prior to its adjournment. The latter was held to be within the power of the legislature and not to be *ex post facto* legislation.¹

§ 654. Acts relating to evidence.—A statute which enlarges the class of persons who may be competent as witnesses is not *ex post facto* in its application to offenses previously committed, for it does not attach criminality to any act previously done, and which was innocent when done, nor aggravate past crimes, nor increase the punishment therefor; nor does it alter the degree or lessen the amount or measure of the proof made necessary to conviction for such offenses. Such alterations relate to modes of pro-

⁹⁷ *Wooley v. Watkins*, 2 Idaho, 590, 22 Pac. 102.

⁹⁹ *McGlasson v. Johnson*, 86 Iowa, 477, 53 N. W. 267.

⁹⁸ *People v. Hawker*, 153 N. Y. 234, 46 N. E. 607. To same effect, *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247.

¹ *Ex parte Larkin*, 1 Okl. 53, 25 Pac. 745, 11 L. R. A. 418.

cedure only, which the state may regulate at pleasure, and in which no one can be said to have a vested right. Mr. Justice Harlan, in enunciating this doctrine as the opinion of the court, said: "Alterations which do not increase the punishment, nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but — leaving untouched the nature of the crime and the amount or degree of proof essential to conviction — only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged."² A statute making a comparison of handwriting competent evidence in criminal cases,³ or prescribing the effect of certain facts as evidence,⁴ is not *ex post facto*, though made to apply to trials for past offenses. A statute that in a criminal prosecution for attempting to procure a miscarriage, the dying declarations of the woman should be admissible, was held not to apply to a prosecution commenced after the act for an offense committed before.⁵

²Hopt v. Utah, 110 U. S. 574, 4 S. C. Rep. 202, 28 L. Ed. 262; Laughlin v. Commonwealth, 13 Bush, 261; Hart v. State, 40 Ala. 32, 88 Am. Dec. 752; Laurence v. State, 31 Tex. Crim. Rep. 601, 21 S. W. 766.

³State v. Thompson, 141 Mo. 408, 42 S. W. 949. The court says: "Our conclusion is that the act does not permit the conviction of defendant on less evidence than was required prior to its passage. It is an exercise of the power of the state to provide methods of procedure in

her courts. As to all trials occurring after its enactment it was prospective and not retroactive. No vested right of defendant was disturbed by said act; it is not obnoxious to the charge of being *ex post facto* within the meaning of the state or federal constitution." p. 422.

⁴State v. Beach, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179; State v. Gay, 18 Mont. 51, 44 Pac. 411.

⁵Commonwealth v. Homer, 153 Mass. 343, 26 N. E. 872.

§ 655. Acts in relation to jurisdiction, change of venue, etc.—A law changing the place of trial from one county to another county in the same district, or to a different district from that in which the offense was committed or the indictment found, is not an *ex post facto* law, though passed subsequently to the commission of the offense or the finding of the indictment.⁶ Such a law does not alter the situation of the defendant in respect to his offense or its consequences.⁷ Acts for transferring criminal cases to another court,⁸ or providing a new tribunal or giving a new jurisdiction to try offenses already committed,⁹ or changing the constitution of the court,¹⁰ do not abridge any right and are not *ex post facto*. So of the repeal of a statute which allowed the defendant to secure a change of venue on his preliminary examination.¹¹ A statute conferring on justices of the peace jurisdiction of the offense of intoxication was held not *ex post facto*, as it did not change the punishment, the rules of evidence or the nature of the crime.¹² It was held to make no difference that the defendant, if he appealed to the county court, would have to pay more costs than he would if the prosecution was begun in the county court in the first instance, as provided in the former law.

§ 656 (469). Acts relating to practice and procedure.—When an offense was committed the jury was by statute judge of the law. This act was repealed before the trial. Such change, as applied to that case, was held not *ex post facto*.¹³ Nor are treaties which provide for surrender of persons charged with previous offenses;¹⁴ nor statutes giv-

⁶ Gut v. State, 9 Wall. 35, 19 L. Ed. 573.

⁷ Cook v. United States, 138 U. S. 157, 11 S. C. Rep. 57, 34 L. Ed. 906.

⁸ State v. Cooler, 8 S. E. 692.

⁹ Commonwealth v. Phillips, 11 Pick. 28; Wales v. Belcher, 3 id. 508; State v. Sullivan, 14 Rich. L. 281; Ewing's Case, 5 Gratt. 701.

¹⁰ State v. Thompson, 141 Mo. 408, 42 S. W. 949.

¹¹ People v. McDonald, 5 Wyo. 526, 42 Pac. 15.

¹² State v. Welch, 65 Vt. 50, 23 Atl. 900.

¹³ Marion v. State, 20 Neb. 233, 29 N. W. 911.

¹⁴ In re De Giacomo, 12 Blatchf. 391, Fed. Cas. No. 3747.

ing additional challenges to the government;¹⁵ statutes reducing the defendant's peremptory challenges,¹⁶ or modifying the grounds of challenge for cause;¹⁷ or reducing the time allowed for making challenges for cause by the defendant;¹⁸ statutes authorizing amendments to indictments;¹⁹ statutes regulating the framing of indictments with a view to exclude redundancies and reduce them to essential allegations;²⁰ statutes generally to facilitate the routine of procedure and preclude defendants from taking advantage of mere technicalities which do not prejudice them.²¹ Where there has been a legal conviction, but an erroneous judgment thereon, which resulted according to the law in a discharge of the convict on a reversal of the judgment, a law enacted subsequent to the commission of the crime, that on such a reversal the court in which the conviction was had should, on return of the record, pass such sentence thereon as the appellate court should direct, was not an *ex post facto* law.²²

In such a case, Shaw, C. J., said, with reference to the provisions of such a statute: "They relate simply to errors in the imposition of sentences, in cases where neither the law nor the evidence upon which the convictions rest is in any respect impugned, where the original process is right,

¹⁵ Jones v. State, 1 Ga. 610; Walston v. Commonwealth, 16 B. Mon. 15; Walter v. People, 32 N. Y. 147; Warren v. Commonwealth, 37 Pa. St. 45; State v. Ryan, 13 Minn. 370; State v. Wilson, 48 N. H. 398; Commonwealth v. Dorsey, 103 Mass. 412.

¹⁶ Dowling v. State, 5 Sm. & M. 664; South v. State, 86 Ala. 617; State v. Sheeves, 81 Iowa, 615, 47 N. W. 899.

¹⁷ Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492.

¹⁸ State v. Taylor, 134 Mo. 109, 35 S. W. 92; State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

¹⁹ Lasure v. State, 19 Ohio St. 43; State v. Manning, 14 Tex. 402; Sulivan v. Oneida, 61 Ill. 242.

²⁰ State v. Corson, 59 Me. 137; State v. Learned, 47 id. 426.

²¹ Commonwealth v. Hall, 97 Mass. 570; Lasure v. State, 19 Ohio St. 43; State v. Jackson, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829; State v. Bulling, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830; Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632.

²² Ratzky v. People, 29 N. Y. 124; Jacquins v. Commonwealth, 9 Cush. 279.

the facts sufficient and regularly proved, and all the proceedings, up to the sentence, were right, and where the alleged error is in the sentence only. Now is this act retrospective or prospective? It certainly refers, in its terms, to the future, and to writs of error thereafter to be brought. It was competent for the legislature to take away writs of error altogether, in cases where the irregularities are formal and technical only, and to provide that no judgment should be reversed for such cause. It is more favorable to the party to provide that he may come into court upon the terms allowed by this statute than to exclude him altogether. This act operates like the act of limitations. Suppose an act were passed that no writ of error should be taken out after the lapse of a certain period. It is contended that such an act would be unconstitutional on the ground that the right of the convict to have his sentence reversed upon certain conditions had once vested. But this argument overlooks entirely the well-settled distinction between rights and remedies."²³ A subsequent statute requiring the defense of insanity to be specially pleaded at the arraignment is not *ex post facto*.²⁴ "It works no injustice," say the court, "to the defendant and deprives him of no substantial right which he would otherwise have. It is not, therefore, objectionable as an *ex post facto* [law] when applied, as in the present case, to a crime already committed at the time of its enactment, any more than a statute authorizing indictments to be amended, or conferring additional challenges on the government, or authorizing a change of venue, or other like statutes regulating the mode of judicial or forensic proceeding in a cause."²⁵ The right to give bail

²³ *Jacquins v. Commonwealth*, 9 Cush. 279.

²⁴ *Perry v. State*, 87 Ala. 30, 6 So. 425.

²⁵ *Perry v. State*, 87 Ala. 30, 6 So. 425. A statute of Iowa authorized the treatment of traffic in intoxicating liquors as a nuisance and

subject to equitable proceedings for abatement. A later statute authorized the court to tax an attorney fee in such cases against the defendant and to close the building in which the nuisance had been maintained for one year. This latter law, applied to a nui-

pending an appeal may be taken away by a repeal of the statute.²⁶ An act permitting crimes to be prosecuted by indictment or information was held to apply to past offenses and as so applied not to be *ex post facto*.²⁷

§ 657. **Habitual criminals statutes.**—A statute of Ohio provided that any person who, having been twice convicted and imprisoned for felony, should be convicted and sentenced in Ohio for a felony thereafter committed, should be deemed an habitual criminal and, after the expiration of the term for which he is sentenced, should be detained in the penitentiary for life unless pardoned by the governor or paroled by the board of managers. The act was held valid, and the court says: "A law cannot properly be considered retroactive when it apprises one who has established, by previous unlawful acts, a criminal character, that if he perpetrates further crimes the penalty denounced by the law will be heavier than upon one less hardened in crime. In such case the party is informed before he commits the subsequent offense of the full measure of liability he will incur by its perpetration, and therefore does not fall within the class that is entitled to the protection afforded by the constitutional guaranty against the enactment of *ex post facto* laws or retroactive laws, for the object sought by those guarantees, in respect to this kind of legislation, is that no transgressor of a penal statute shall be subjected by

sance created or maintained prior to its passage, was held not *ex post facto*. "This," say the court, "is a civil not a criminal proceeding, and the provisions of the statute referred to relate to the remedy. The right to a particular mode of procedure is not a vested one which the state cannot change or abolish." *Drake v. Jordan*, 73 Iowa, 707, 36 N. W. 653, citing *Cooley, C. L.* (5th ed.) 349, 433; *Tilton v. Swift*, 40 Iowa, 80; *Wormley v. Hamburg*, 40 Iowa, 25; *Equitable L. Ins. Co.*

v. Gleason, 56 Iowa, 48; *County of Kossuth v. Wallace*, 60 Iowa, 508, 15 N. W. 305.

²⁶ *In re Shoemaker*, 2 Okl. 606, 39 Pac. 284.

²⁷ *People v. Campbell*, 59 Cal. 243, 48 Am. Rep. 257; *State v. Parks*, 165 Mo. 496, 65 S. W. 735; *State v. Kyle*, 166 Mo. 287, 65 S. W. 763; *Lybarger v. State*, 2 Wash. 552; *In re Wright*, 3 Wyo. 478, 27 Pac. 565, 31 Am. St. Rep. 94, 13 L. R. A. 741. *Contra*, *State v. Kinsley*, 10 Mont. 537, 26 Pac. 1066.

subsequent legislation to any penalty, liability or consequence that was not attached to the transgression when it occurred.”²⁸

Similar acts have been sustained in Massachusetts and other states.²⁹ The supreme court of the former state says: “In punishing offenses committed after its passage it punishes the offenders for a criminal habit whose existence cannot be proved without showing their voluntary criminal act done after they are presumed to have had knowledge of the statute. Such an act is the manifestation of the habit, which tends to establish and confirm it, and for which the wrongdoer may well be held responsible.”³⁰ It is held to be immaterial that the former convictions were prior to the act, or in another jurisdiction.³¹ “In fixing a penalty regard may be had to previous conduct without limiting it to the jurisdiction in which the last offense was committed.”³² A statute fixing a greater punishment for the second or third convictions is not *ex post facto*, though the earlier convictions were before the passage of the act.³³ But in such case the conviction for which the greater punishment is imposed must be for a crime committed after the passage of the act.³⁴

²⁸ Blackburn v. State, 50 Ohio St. 428, 36 N. E. 18.

²⁹ Commonwealth v. Graves, 155 Mass. 163, 29 N. E. 579, 16 Am. St. Rep. 256; Sturtevant v. Commonwealth, 158 Mass. 598, 33 N. E. 648; McDonald v. Commonwealth, 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293.

³⁰ Commonwealth v. Graves, 155 Mass. 163, 165, 29 N. E. 579, 16 Am. St. Rep. 256.

³¹ Commonwealth v. Graves, 155 Mass. 163, 165, 29 N. E. 579, 16 Am. St. Rep. 256; McDonald v. Commonwealth, 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293.

³² McDonald v. Commonwealth,

173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293.

³³ Herndon v. Commonwealth, 105 Ky. 197, 48 S. W. 989, 88 Am. St. Rep. 303; Ross' Case, 2 Pick. 165; Commonwealth v. Hall, 97 Mass. 570; State v. Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542; People v. Butler, 3 Cow. 347; Ex parte Gutierrez, 45 Cal. 429; People v. Stanley, 47 Cal. 113; Plumbly v. Commonwealth, 2 Met. 413; Kelly v. People, 115 Ill. 583; Rand v. Commonwealth, 9 Gratt. 738; Ingalls v. State, 48 Wis. 647.

³⁴ Brown v. Commonwealth, 100 Ky. 127, 37 S. W. 496.

§ 658 (470). **Change of punishment by subsequent legislation.**— Obviously enough a retrospective statute would be *ex post facto* which increased in kind the punishment, or which added new elements of punishment. But there has been some diversity of decision where the punishment has been changed and on the whole, as judicially considered, has thus been made less severe.³⁵ It is believed, however, that at the present time the doctrine accepted as most consonant to reason and authority is that laid down in *Hartung v. People*.³⁶ After the prisoner had been convicted of murder and sentenced to death, and while her case was pending on appeal, the legislature changed the law for the punishment of murder in general, so as to authorize the governor to postpone indefinitely the execution of the sentence of death, and to keep the party confined in the penitentiary at hard labor until he should order the full execution of the sentence or should pardon or commute it. The court of appeals held that this later law repealed all laws for punishment for murders theretofore committed. It was *ex post facto* as to that case, and could not be applied to it. Mr. Justice Denio said: "It is highly probable that it was the intention of the legislature to extend favor, rather than increased severity, towards this convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases, rather than that which existed when they committed the offenses of which they were convicted. But the case cannot be determined upon such considerations. No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of

³⁵ See *Strong v. State*, 1 Blackf. State v. Arlin, 39 N. H. 179; *Turner* 193; *Herber v. State*, 7 Tex. 69; *v. State*, 40 Ala. 21.
McInturf v. State, 20 Tex. App. ³⁶ 22 N. Y. 95.
 335; *Clarke v. State*, 22 Miss. 261;

the thing, and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes. . . . It is enough to bring the law within the condemnation of the constitution that it changes the punishment, after the commission of the offense, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law. . . . It is enough, in my opinion, that it changes it in any manner, except by dispensing with divisible portions of it. . . . Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. Any change which should be referable to prison discipline or penal administration as its primary object might also be made to take effect upon past as well as future offenses; as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict; but would not raise any question under the constitutional provision " against *ex post facto* laws."³⁷

In *Commonwealth v. McDonough*³⁸ it was held that a law passed after the commission of the offense, which mitigated the punishment, as regarded the fine and the maximum of imprisonment that might be inflicted, was an *ex post facto* law as to that case, because the minimum of imprisonment was made three months, whereas before there was no mini-

³⁷ *Shepherd v. People*, 25 N. Y. People, 6 Cal. 554; *State v. Willis*, 406; *Ratzky v. People*, 29 id. 124; 66 Mo. 131; *Marion v. State*, 16 Neb. 349; *State v. Cooler*, 8 S. E. 692; 212; *Carter v. Burt*, 12 Allen. 424; *State v. Sanford*, 67 Conn. 286, 34 Atl. 1045.
³⁸ *Green v. Shumway*, 39 N. Y. 418; *Atl.* 1045.
In re Petty, 22 Kan. 477; *Garvey v.* ³⁸ 13 Allen, 581.

imum limit to the court's discretion. This slight variance in the law was held to make it *ex post facto* and void as to that case, though the effect of the decision was to leave no law by which the defendant could be punished, and he was discharged, though found guilty of the offense. As to a defendant convicted of carrying a concealed weapon, an amended law was held *ex post facto*, first, because it abrogated the right which before existed of defending against the charge on the ground that he had good and sufficient reason to apprehend an attack, and made an act criminal which was not so at the time the amendment was passed, and because it changed but did not mitigate the punishment for the offense. "There has been much diversity of opinion," said Arnold, C. J., "as to what would constitute mitigation of punishment in such a case; but the view best sustained by reason and authority is, that a law changing the punishment of offenses committed before its passage is objectionable, as being *ex post facto*, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or administration as its primary object."³⁹ It is enough for courts to render judgment according to law, without being required to determine the relative severity of different punishments, when there is no common standard in the matter by which the mind can be satisfactorily guided."⁴⁰ An act providing for indeterminate sentences,⁴¹ or which would operate to deprive the prisoner of credit for good behavior,⁴² cannot be applied to past offenses. A law which clearly mollifies the punishment, by omitting some part of it or by reducing the *maximum* or *minimum*, is not objectionable.⁴³

³⁹ Cooley, Const. Lim. 329.

⁴¹ People v. Dane, 81 Mich. 36, 45

⁴⁰ Murphy v. Commonwealth, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, modifying Commonwealth v. Brown, 167 Mass. 144, 45 N. E. 1; Lindzey v. State, 65 Miss. 542, 5 So. 99; Cooley, Const. Lim. 324.

N. W. 655.

⁴² In re Canfield, 98 Mich. 644, 57 N. W. 807; In re Walsh, 87 Mich. 466; Opinion of Justices, 13 Gray, 618.

⁴³ Lynn v. State, 84 Md. 67, 35

A law which permitted the jury to fix the punishment in capital cases at imprisonment for life, where before it had been death in all cases, was held not to be an *ex post facto* law.⁴⁴ An act providing that one sentenced to death should be kept in solitary confinement after the warrant of execution had been issued, and that only certain persons should be allowed to visit him, was held to apply only in case of crimes thereafter committed.⁴⁵

§ 659. Changing the mode of executing sentence.—An act provided that the death penalty should be inflicted before sunrise and within the jail or other inclosure higher than the gallows, and limited the number and description of those who might be present at the execution. It was held not to be an *ex post facto* law.⁴⁶ The court says: "Whether a convict, sentenced to death, shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other inclosure, and whether the inclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights. The same observation may be made touching the restriction in section 5 as to the number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of newspapers. These are regulations which the legislature, in its wisdom, and for the public good, could legally prescribe in respect to executions occurring after the passage of the act, and cannot, even when applied to offenses previously committed, be regarded as *ex post facto* within the meaning of the constitution."

§ 660 (471). Laws impairing obligation of contracts.—The federal constitution provides that no state shall pass any law impairing the obligation of contracts.⁴⁷ The obli-

Atl. 21; *People v. Hayes*, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572.

⁴⁵ *Holden v. Minnesota*, 137 U. S. 483, 11 S. C. Rep. 143, 34 L. Ed. 734.

⁴⁶ *Id.*

⁴⁴ *McGuire v. State*, 76 Miss. 504, 25 So. 495.

⁴⁷ Art. I, sec. 10.

gation of a contract is the law which binds the parties to perform their agreement.⁴⁸ It is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation.⁴⁹ The prohibition does not apply to congress.⁵⁰ A contract valid at its inception cannot be made invalid, its construction changed, or the remedy thereon taken away or materially impaired, by subsequent legislation.⁵¹ The laws which exist at the time and place of the making of a contract determine its validity, construction, discharge, and measure of efficiency for its enforcement.⁵² A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word

⁴⁸ *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Sturges v. Crowninshield*, 4 Wheat. 202, 4 L. Ed. 529.

⁴⁹ *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132.

⁵⁰ *Evans-Snider-Buel Co. v. McFadden*, 105 Fed. 293, 44 C. C. A. 494.

⁵¹ *Haynes v. Tredway*, 133 Cal. 400, 65 Pac. 892; *Malone v. Roy*, 134 Cal. 344, 66 Pac. 313; *Hall v. State*, 29 Fla. 79, 11 So. 97, 30 Am. St. Rep. 95; *Foster v. Byrne*, 76 Iowa, 295, 35 N. W. 513, 41 N. W. 22; *Dunn v. Stevens*, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348; *State v. Gilliam*, 18 Mont. 94, 44 Pac. 394, 45 Pac. 661; *State Savings Inst. v. Barret*, 25 Mont. 112, 63 Pac. 1030; *Long v. Walker*, 105 N. C. 90, 10 S. E. 858; *Yeatman v. King*, 2 N. D. 421, 51 N. W. 721, 33 Am. St. Rep. 797; *State v. Sears*, 29 Ore. 580, 43 Pac. 482, 46 Pac. 785, 54 Am. St. Rep. 808; *Hollister v. Donahoe*, 11 S. D. 497, 79 N. W. 959; *Thompson v. Cobb*, 95 Tex. 140, 65 S. W. 1090; *Garneau v. Port Blakely Mill Co.*,

8 Wash. 467, 36 Pac. 463; *Swinburn v. Mills*, 17 Wash. 611, 50 Pac. 489, 61 Am. St. Rep. 932; *Canadian & Am. Mort. & T. Co. v. Blake*, 24 Wash. 102, 63 Pac. 1100, 85 Am. St. Rep. 946; *Barnitz v. Beverly*, 163 U. S. 118, 16 S. C. Rep. 1042, 41 L. Ed. 93; *McConnaughy v. Pennoyer*, 43 Fed. 196; *Crowther v. Fidelity Ins., Trust & Safe Dep. Co.*, 85 Fed. 41, 29 C. C. A. 1; *Southwest Mo. Light Co. v. Joplin*, 113 Fed. 817.

⁵² *Green v. Biddle*, 8 Wheat. 1, 92, 5 L. Ed. 547; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Bronson v. Kinzie*, 1 How. 311, 319, 11 L. Ed. 143; *McCracken v. Hayward*, 2 How. 608, 612, 11 L. Ed. 397; *Walker v. Whitehead*, 16 Wall. 314, 21 L. Ed. 357; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. Ed. 610; *Mason v. Haile*, 12 Wheat. 370, 6 L. Ed. 660; *Walker v. Boggess*, 41 W. Va. 588, 23 S. E. 550.

"ton" should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedment may be extinguished by a process of bankruptcy would involve its discharge; and a statute forbidding the sale of any of the debtor's property under a judgment upon such a contract would relate to the remedy. It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last mentioned not less than the first.⁵³ Statutes which, if applied to existing contracts, would impair their obligation, will, if possible, be construed as prospective so as to sustain their validity and avoid conflict with the constitution.⁵⁴

⁵³ Von Hoffman v. Quincy, 4 Wall. 535, 552, 18 L. Ed. 403.

⁵⁴ McDonald v. Berry, 90 Ala. 464, 7 So. 838; State v. Wallis, 57 Ark. 64, 20 S. W. 811; Fayetteville B. & L. Ass'n v. Bowlin, 63 Ark. 573, 39 S. W. 1046; Smissaert v. Prudential Ins. Co., 15 Colo. App. 442, 62 Pac. 967; Maynard v. Marshall, 91 Ga. 840, 18 S. E. 403; Stoner v. Pickert, 115 Ga. 653, 42 S. E. 41; Kersten v. Voight, 61 Ill. App. 42; S. C. affirmed, Voight v. Kersten, 164 Ill. 314, 45 N. E. 543; Richardson v. U. S. Mortgage Co., 89 Ill. App. 670; S. C. affirmed, 194 Ill. 259, 62 N. E. 606; Bauer Grocer Co. v. Zelle, 172 Ill. 407, 50 N. E. 238; Willard v. Sturm, 96 Iowa, 555, 65 N. W. 847; Farmers' Co-op. Creamery Co. v. Iowa State Ins. Co., 112 Iowa, 608, 84 N. W. 904; Ratcliffe v. Marrs, 87 Ky. 26, 7 S. W. 395, 8 S. W. 876; MacNichol v. Spence, 83 Me. 87, 21 Atl. 748; Kimball v. Masons' Fraternal Acc. Ass'n, 90 Me. 183, 38

Atl. 102; Klein v. Bayer, 81 Mich. 233, 45 N. W. 991; Reed v. Swan, 133 Mo. 100, 34 S. W. 483; Walton v. Fudge, 63 Mo. App. 52; Singer Mfg. Co. v. Shull, 74 Mo. App. 486; American B. & L. Ass'n v. Rainbolt, 48 Neb. 434, 67 N. W. 493; Roberts v. Cohen, 60 App. Div. 259, 70 N. Y. S. 57; Moore v. Beaman, 111 N. C. 328, 16 S. E. 177; Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379; Seton v. Hoyt, 34 Ore. 266, 55 Pac. 967, 75 Am. St. Rep. 641; Sproul v. Standard Plate Glass Co., 201 Pa. St. 103, 50 Atl. 1003; Mutual Aid, Loan & Invest. Co. v. Logan, 55 S. C. 294, 33 S. E. 372; Interstate L. & B. Ass'n v. Powell, 55 S. C. 316, 33 S. E. 355; Childs v. Hill, 20 Tex. Civ. App. 162, 49 S. W. 652; In re Heilbron's Estate, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; Hale v. Stenger, 22 Wash. 516, 61 Pac. 156; Rand, McNally & Co. v. Hartranft, 29 Wash. 591, 70 Pac. 77; Fowler v. Lewis, 36 W. Va. 112,

§ 661 (472). The prohibition has been considered as extending to contracts executed and executory; to conveyances of land as well as commercial contracts; to public grants from the state to corporations and individuals, as well as private contracts between citizens; to grants and charters in existence when the constitution was adopted and even before the revolution, and to compacts between the different states themselves.⁵⁵ "An executed contract," says Chief Justice Marshall, "as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is therefore always estopped by his own grant. Since, then, in fact, a grant is a contract, the obligation of which still continues, and since the constitution uses the general term 'contract,' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between

14 S. E. 447; *Walker v. Boggess*, 41 W. Va. 588, 23 S. E. 550; *Castro v. Greer*, 44 W. Va. 332, 30 S. E. 100; *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385; *Anheuser-Busch Brewing Ass'n v. Bond*, 66 Fed. 653, 13 C. C. A. 665, 32 U. S. App. 38; *The Queen*, 93 Fed. 834; *Webster v. Bowers*, 104 Fed. 627.

⁵⁵ *Ogden v. Saunders*, 12 Wheat. 217, 6 L. Ed. 606; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162; *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. Ed. 303; *Terrett v. Taylor*, 9 Cranch, 43, 3 L. Ed. 650; *Pawlet v. Clark*, 9 Cranch, 292, 3 L. Ed. 735; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Society for Propagating the Gospel v. New Haven*, 8 Wheat. 464, 481, 5 L. Ed. 662; *Green v. Biddle*, 8 Wheat. 1, 5

L. Ed. 547; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. Ed. 302; *Montgomery v. Kasson*, 16 Cal. 189; *Grogan v. San Francisco*, 18 Cal. 590; *State v. Barker*, 4 Kan. 379, 435, 96 Am. Dec. 175; *Wabash, etc. R. R. Co. v. Beers*, 2 Black, 448, 17 L. Ed. 327; *State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. Ed. 271; *Hawkins v. Barney's Lessee*, 5 Pet. 457, 8 L. Ed. 190; *People v. Platt*, 17 John. 195; *Rehoboth v. Hunt*, 1 Pick. 224; *Lowry v. Francis*, 2 Yerg. 534; *University of North Carolina v. Fay*, 1 Murph. 58; *De Graff v. St. Paul, etc. R. R. Co.*, 23 Minn. 144; *Robertson v. Land Commissioner*, 44 Mich. 274, 6 N. W. 659.

individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding these grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances."⁵⁶ When a state becomes a party to a contract, the same rules of law are applied to her as to private persons under like circumstances.⁵⁷ So when the state, as such, or any lesser public corporation, makes a grant, or otherwise contracts, it is bound by its obligations by the same supreme and paramount rule.⁵⁸

§ 662 (473). Charters creating corporations for private purposes, laws giving franchises, bounties to encourage enterprise and expenditures, and patents and copyrights, or any exclusive privilege, are also inviolable contracts, the obligations of which are secured by the constitutional provision under consideration.⁵⁹ It does not apply to municipal char-

⁵⁶ *Fletcher v. Peck*, 6 Cranch, 87, 136, 3 L. Ed. 162.

⁵⁷ *Davis v. Gray*, 16 Wall. 232, 21 L. Ed. 447.

⁵⁸ *Cincinnati, etc. R. R. Co. v. Carthage*, 36 Ohio St. 631; *State v. Commissioners, etc.*, 4 Wis. 414.

⁵⁹ *Slaughter-House Cases*, 16 Wall. 36, 74, 21 L. Ed. 394; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Planters' Bank v. Sharp*, 6 How. 301, 391, 12 L. Ed. 447; *Trustees of V. University v. Indiana*, 14 How. 268, 14 L. Ed. 416; *State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977; *State v. Heyward*, 3 Rich. 389; *Norris v. Trustees, etc.*, 7 G. & J. 7; *Grammar School v. Burt*, 11 Vt. 632; *Commonwealth v. Cullen*, 13 Pa. St. 133; *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466; *State v. Noyes*, 47 Me. 189; *Bank of Natchez v. State*, 6 Sm. & M. 599; *People v. Manhattan Co.*, 9 Wend.

351; *Miners' Bank v. United States*, 1 Greene (Iowa), 553; *Bridge Co. v. Hoboken Co.*, 13 N. J. Eq. 81; *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 227, 41 Am. Dec. 549; *People v. Jackson, etc. Plank Road Co.*, 9 Mich. 285; *Hawthorne v. Calef*, 2 Wall. 10, 17 L. Ed. 776; *Bank of the Dominion v. McVeigh*, 20 Gratt. 457; *Bank of the State v. Bank of Cape Fear*, 13 Ired. 75; *Mills v. Williams*, 11 id. 558; *Wales v. Stetson*, 2 Mass. 143; *Nichols v. Bertram*, 3 Pick. 342; *King v. Dedham Bank*, 15 Mass. 447, 8 Am. Dec. 112; *Turnpike Co. v. Davidson Co.*, 3 Tenn. Ch. 396; *Sloan v. Pacific Co.*, 61 Mo. 24, 21 Am. Rep. 397; *Central Bridge v. Lowell*, 15 Gray, 106; *State v. Richmond, etc. R. R. Co.*, 73 N. C. 527, 21 Am. Rep. 423; *Detroit v. Plank Road Co.*, 43 Mich. 140, 5 N. W. 275; *Bruffett v. G. W. R. R. Co.*, 25 Ill. 353; *State v. Tombeckbee*

ters or offices; they are mere agencies of government, and, except as specially restrained by other constitutional restrictions, are within the continued exclusive control of the legislature.⁶⁰ Counties and towns are, as to their corporate existence, completely within such control. They may be changed, altered, enlarged, diminished or extinguished by the mere act of the legislature.⁶¹ And all private corporations and grantees of franchises are subject to the exercise of all essential powers of government — to taxation,⁶² so far as not contracted away upon consideration, to the power of eminent domain and of police.⁶³ The legislative power of a state,

Bank, 2 Stew. 30; *Edwards v. Jaggers*, 19 Ind. 407; *People v. Board of State Auditors*, 9 Mich. 327; *Highland Park v. Detroit*, etc. Plank Road Co., 95 Mich. 489, 55 N. W. 382; *Brown University v. Granger*, 19 R. I. 704, 36 Atl. 824, 36 L. R. A. 847; *Commonwealth v. Farmers' Bank*, 97 Ky. 590, 31 S. W. 1013; *Rochester, etc. W. Co. v. Rochester*, 84 App. Div. 71, 82 N. Y. S. 455; *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 23 S. C. Rep. 206; *Newburyport Water Co. v. Newburyport*, 113 Fed. 677.

⁶⁰ *Butler v. Pennsylvania*, 10 How. 402, 13 L. Ed. 472; *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *Newton v. Commissioners*, 100 U. S. 548, 559, 25 L. Ed. 710; *Koontz v. Franklin Co.*, 76 Pa. St. 754; *French v. Commonwealth*, 78 Pa. St. 339; *Augusta v. Sweeney*, 44 Ga. 463, 9 Am. Rep. 172; *Opinion of Justices*, 117 Mass. 603; *People v. Green*, 58 N. Y. 295; *Wyandotte v. Drennan*, 46 Mich. 478, 9 N. W. 500; *State v. Kalb*, 50 Wis. 178, 6 N. W. 557; *People v. Power*, 25 Ill. 187, 181; *Sangamon Co. v. Springfield*, 63 Ill. 66; *Borough of Dunmore's Appeal*,

52 Pa. St. 374; *Guilford v. Cornell*, 18 Barb. 615; *Guilford v. Supervisors*, 13 N. Y. 143; *Richland Co. v. Richland Center*, 59 Wis. 591, 18 N. W. 497.

⁶¹ *Id.*; *Hill v. Memphis*, 134 U. S. 198, 10 S. C. Rep. 562, 33 L. Ed. 887; *Barnett v. Denison*, 145 U. S. 135, 12 S. C. Rep. 819, 36 L. Ed. 652; *Williams v. Eggleston*, 170 U. S. 304, 18 S. C. Rep. 617, 42 L. Ed. 1047; *Atkin v. Kansas*, 191 U. S. 207; *Beckwith v. Racine*, 7 Biss. 142, Fed. Cas. No. 1213.

⁶² *Cooley*, C. L. 340.

⁶³ *Matter of Kerr*, 42 Barb. 119; *West River Br. Co. v. Dix*, 16 Vt. 446; 6 How. 507; *Enfield Tool Br. Co. v. Hartford*, etc. R. R. Co., 17 Conn. 40, 454, 47 Am. Dec. 716; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140; *McCulloch v. Maryland*, 4 Wheat. 316, 327, 4 L. Ed. 579; *Ohio*, etc. R. R. Co. v. McClelland, 25 Ill. 140; *Osborn v. Bank of U. S.*, 9 Wheat. 738, 6 L. Ed. 204; *Indianapolis*, etc. R. R. Co. v. Kercheval, 16 Ind. 84; *Bradley v. McAtee*, 7 Bush, 667, 3 Am. Rep. 309; *State v. Noyes*, 47 Me. 189;

except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. It may increase or diminish the salary or change the mode of compensation.⁶⁴

When the power is reserved to repeal, alter or amend the charters of private corporations, then they are subject to legislative control the same as though no prohibition existed against the impairment of contracts.⁶⁵ In such case charters may be repealed or amended at pleasure, privileges withdrawn or new burdens or obligations imposed. This power may be reserved in the particular charter, or by general law, or by a constitutional provision, and the effect would be the same in each case.⁶⁶ Such a reservation applies to a corporation formed by the consolidation of pre-

Vanderbilt v. Adams, 7 Cow. 349; State v. Sterling, 8 Mo. 697; Calder v. Kurby, 5 Gray, 597; Hirn v. State, 1 Ohio St. 15; Toledo, etc. R. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Chicago Packing Co. v. Chicago, 88 Ill. 221, 30 Am. Rep. 545; People v. Commissioners, 59 N. Y. 92; Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; State v. Southern Pacific Co., 23 Ore. 424, 31 Pac. 960; Wells, Fargo & Co. v. Oregon Ry. & Nav. Co., 15 Fed. 561; Ex parte Koehler, 23 Fed. 529.

⁶⁴ Butler v. Pennsylvania, 10 How. 402, 13 L. Ed. 472; Newton v. Commissioners, 100 U. S. 548, 559, 25 L. Ed. 710.

⁶⁵ McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; Sioux City St. Ry. Co. v.

Sioux City, 78 Iowa, 747, 41 N. W. 4; Williams v. Nall, 108 Ky. 21, 55 S. W. 706; Jackson v. Walsh, 75 Md. 304, 23 Atl. 778; Webster v. Cambridge Female Seminary, 78 Md. 193, 28 Atl. 25; Hamilton Gas Light & C. Co. v. Hamilton City, 146 U. S. 258, 13 S. C. Rep. 90, 36 L. Ed. 963; People v. Cook, 148 U. S. 397, 13 S. C. Rep. 645; Covington v. Kentucky, 173 U. S. 231, 19 S. C. Rep. 383, 43 L. Ed. 679; Northern Central Ry. Co. v. Maryland, 187 U. S. 258, 23 S. C. Rep. 62; San Joaquin, etc. Co. v. Stanislaus County, 113 Fed. 930; Peoples' Gas L. & C. Co. v. Chicago, 114 Fed. 384. But statutes will not be construed so as to take away existing rights though the power exists to do so. Suburban Rapid Transit Co. v. New York, 128 N. Y. 510, 28 N. E. 525.

⁶⁶ Jackson v. Walsh, 75 Md. 304, 23 Atl. 778; Montclair v. New York, etc. Ry. Co., 45 N. J. Eq. 436, 18 Atl.

existing corporations, and the privileges enjoyed by the constituent companies become subject to the power of the legislature.⁶⁷ Where the constitution makes charters subject to the power of repeal, alteration or amendment the legislature cannot bar itself from the exercise of the power, even by a compromise statute, in a matter where the right to exercise the power is disputed.⁶⁸

§ 663 (474). The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed therein, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.⁶⁹ Where municipal bonds have been put upon the market as commercial paper, the rights of the parties thereto are to be determined according to the statutes of the state as they were then construed by her highest court; and in a case involving those rights the supreme court of the United States will not be governed by any subsequent decision in conflict with that under which they became payable. The settled judicial construction of a statute, so far as contract rights were thereunder acquired, is as much a part of the statute as the text itself, and a change of decision is the same in effect on pre-existing contracts as a repeal or an amendment by legislative enactment.⁷⁰ A bankrupt or insolvent law of any state, which discharges both the person of the debtor and his future acquisitions of property, is not "a law impairing the obligation of contracts," so far as respects debts contracted subsequent to the pas-

242; *Northern Central R. R. Co. v. Maryland*, 187 U. S. 258, 23 S. C. Rep. 62.

⁶⁷ *Northern Central Ry. Co. v. Maryland*, 187 U. S. 258, 23 S. C. Rep. 62.

⁶⁸ *Id.*

⁶⁹ *Green v. Biddle*, 8 Wheat. 84, 5 L. Ed. 547; *Planters' Bank v. Sharp*, 6 How. 301, 327, 12 L. Ed. 447.

⁷⁰ *Douglass v. Pike County*, 101 U. S. 677, 25 L. Ed. 968.

sage of such law.⁷¹ But a certificate of discharge, under such a law, cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States or of any other state than that where the discharge was obtained.⁷² A law which authorizes the discharge of a contract by the payment of a smaller sum or at a different time or in a different manner than the parties have agreed impairs its obligation by substituting for the compact of the parties a legislative act to which they have never assented.⁷³ "It is within the undoubted power of state legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within a limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a deed is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts."⁷⁴ Contracts made in violation of some interest or revenue regulation may be validated by repeal of such regulation.⁷⁵ In validating a void contract its obligations

⁷¹ *Hundley v. Chaney*, 65 Cal. 363, 4 Pac. 238; *Pomeroy v. Gregory*, 66 Cal. 574, 6 Pac. 493; *Porter v. Innes*, 79 Cal. 183, 21 Pac. 729. Such a law was held invalid as to past debts in *Elton v. O'Connor*, 6 N. D. 1, 68 N. W. 84, 33 L. R. A. 524.

⁷² *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606. See *Denny v. Bennett*, 128 U. S. 439, 9 S. C. Rep. 134, 32 L. Ed. 491.

⁷³ *Golden v. Prince*, 3 Wash. 313.

⁷⁴ *Jackson v. Lamphire*, 3 Pet. 290, 7 L. Ed. 679.

⁷⁵ *Iowa Sav. & L. Ass'n v. Heidt*, 107 Iowa, 297, 77 N. W. 1050, 43 L. R. A. 689; *Iowa Sav. & L. Ass'n v. Curtis*, 107 Iowa, 504, 78 N. W. 208; *Hardaway v. Lilly* (Tenn.), 48 S. W. 712; *Smoot v. People's Perpetual*

L. & B. Ass'n, 95 Va. 686, 29 S. E. 746, 41 L. R. A. 589; *Bosang v. Iron Belt B. & L. Ass'n*, 96 Va. 119, 30 S. E. 440. In *Petterson v. Berry*, 125 Fed. 902, 60 C. C. A. 610, the court says: "It is well settled that the defense of usury, either to the principal of a contract debt or to the interest thereon, is in the nature of a penalty or forfeiture, which may be taken away by legislation, both as respects previous as well as subsequent contracts," citing *Ewell v. Daggs*, 108 U. S. 143, 2 S. C. Rep. 408, 27 L. Ed. 682; *McBrown v. Scottish Invest. Co.*, 153 U. S. 313, 14 S. C. Rep. 852, 38 L. Ed. 729; *Talbot v. Sioux City Nat. Bank*, 185 U. S. 172, 22 S. C. Rep. 612, 46 L. Ed. 857.

are not impaired, but legal impediments to its enforcement according to the intention of the parties are removed.⁷⁶ A corporation charter is not subject to forfeiture for acts or omissions which were not causes of forfeiture at the time they occurred.⁷⁷ If, when a private corporation contracts a debt, its stockholders are under a certain liability by law, this law cannot, as to creditors becoming such while it existed, be repealed.⁷⁸ So a statute imposing liabilities on stockholders in a corporation to which they were not subject by the charter or general law under which the corporation was organized is unconstitutional.⁷⁹

§ 664 (475). The prohibition of the constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the state, and to those of its agents acting under its authority, as well as to those between individuals.⁸⁰ And that obligation is impaired, in the sense of the constitution, when the means by which a contract at the time of its execution could be enforced—that is, by which the parties could be obliged to perform it—are rendered less efficacious by legislation operating directly upon those means.⁸¹ As long as a city exists, laws are void which withdraw or restrict her taxing power, so as to impair the obligation of her contracts made upon a

⁷⁶ *Satterlee v. Matthewson*, 2 Pet. 406, 7 L. Ed. 458; *Gibson v. Hibbard*, 13 Mich. 214; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 236; *Wood v. Kennedy*, 19 Ind. 68. See *Baughner v. Nelson*, 9 Gill, 299.

⁷⁷ *People v. Jackson, etc.* Pl. R. Co., 9 Mich. 285.

⁷⁸ *Hawthorne v. Calef*, 2 Wall. 10, 17 L. Ed. 776; *Corning v. McCullough*, 1 N. Y. 47; *Story v. Furman*, 25 N. Y. 214; *Norris v. Wrenschall*, 34 Md. 492.

⁷⁹ *Ireland v. Palestine, etc. T. Co.*, 19 Ohio St. 369.

⁸⁰ *State v. McPeak*, 31 Neb. 139,

47 N. W. 691; *State v. Thayer*, 46 Neb. 137, 64 N. W. 700; *Tacoma Land Co. v. Young*, 18 Wash. 495, 52 Pac. 244; *Pennoyer v. McConaughy*, 140 U. S. 1, 11 S. C. Rep. 699, 35 L. Ed. 363; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 22 S. C. Rep. 410, 46 L. Ed. 592; *Waggoner v. Flack*, 188 U. S. 595, 23 S. C. Rep. 345; *Southwest Mo. Light Co. v. Joplin*, 113 Fed. 817. Compare *Thomson v. Baker*, 90 Tex. 163, 38 S. W. 21.

⁸¹ *Wolff v. New Orleans*, 103 U. S. 358, 367, 26 L. Ed. 395.

pledge, expressly or impliedly given, that it shall be exercised for their fulfillment.⁸² A statute authorized a city to issue bonds to a specified amount, and, among other stringent provisions to secure their prompt payment, prohibited the subsequent issue of any other bonds, for any other purpose whatever, except in payment of such bonded debt. It was held that the holders of those bonds were entitled to the benefit of this restriction as a most material element of the contract, and that it was not subject to legislative repeal and amendment so as to impair the right or diminish the security without their consent.⁸³ Where a municipal corporation has lawfully issued its bonds for specified sums, to bear interest at a stated rate, it cannot subsequently provide for taxing that debt, and for detaining a part of it for payment of the tax.⁸⁴

§ 665 (476). **Change of remedy.**—The constitutional provision is a negation. No law is permitted to be enacted to impair the obligation of contracts. There is no mandate to enact laws for their enforcement. Remedies exist in the common law. And courts are supposed to exist throughout the states with competent jurisdiction. The practical question arises upon changes in the law — upon affirmative legislation. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guarantied by the constitution against impairment.⁸⁵ If legislation “tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb,

⁸² *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395; *State v. Madison*, 15 Wis. 30; *Von Baumbach v. Bade*, 9 id. 559; *Phelps v. Rooney*, id. 70, 76 Am. Dec. 244; *State v. Kearney*, 49 Neb. 325, 68 N. W. 533; 49 Neb. 337, 70 N. W. 255; *Padgett v. Post*, 106 Fed. 600, 45 C. C. A. 488.

People v. Woods, 7 Cal. 579; *People v. Bond*, 10 id. 563; *Munday v. Rahway*, 43 N. J. L. 338; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623.

⁸⁴ *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760.

⁸⁵ *Walker v. Whitehead*, 16 Wall. 314, 21 L. Ed. 357.

⁸³ *Smith v. Appleton*, 19 Wis. 468;

qui cito dat bis dat,—he who gives quickly gives twice,—has its counterpart in a maxim equally sound,—*qui serius solvit, minus solvit*,—he who pays too late, pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition.⁸⁶ The rule affirmed by the court of last resort is that in modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit or alter them, provided that it does not deny a remedy, or so embarrass it with conditions as to seriously impair the value of the right.⁸⁷ If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired.⁸⁸ A statutory provision requiring a plaintiff

⁸⁶ Louisiana v. New Orleans, 102 U. S. 203, 26 L. Ed. 132.

⁸⁷ Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610; Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143; Sturges v. Crowninshield, 4 Wheat. 202, 4 L. Ed. 529; Mason v. Haile, 12 Wheat. 370, 6 L. Ed. 660; Green v. Biddle, 8 Wheat. 92, 5 L. Ed. 547; White v. Hart, 13 Wall. 646, 20 L. Ed. 685; Waggoner v. Flack, 188 U. S. 595, 23 S. C. Rep. 345.

To the same effect: Tutwiler v. Tuscaloosa Coal, Iron & Land Co., 89 Ala. 391, 7 So. 98, 18 Am. St. Rep. 116; Richardson v. U. S. Mortgage & T. Co., 194 Ill. 259, 62 N. E. 606; Smith v. Bell, 70 Ill. App. 490; Jack v. Cold, 114 Iowa, 349, 86 N. W. 374; Petition of Savings Bank, 69 N. H. 84, 39 Atl. 522; Mexican National Ry. Co. v. Musette, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642.

⁸⁸ Id.; Huntzinger v. Brook, 3 Grant's Cas. 243; Evans v. Montgomery, 4 Watts & S. 218; McDan-

iel v. Webster, 2 Houst. 305; Read v. Bank, 28 Me. 318; Walker v. Whitehead, 16 Wall. 314, 21 L. Ed. 357; Von Hoffman v. Quincy, 4 Wall. 552, 18 L. Ed. 403; Pollard, Ex parte, 40 Ala. 77; Nelson v. McCrary, 60 id. 301; Collins v. East Tenn. etc. R. R. Co., 9 Heisk. 841; Williams v. Weaver, 94 N. C. 134; Cutts v. Hardee, 38 Ga. 350; Stocking v. Hunt, 3 Denio, 274; Wolfkell v. Mason, 16 Abb. Pr. 221; Sullivan v. Brewster, 1 E. D. Smith, 681; Miller v. Moore, id. 739; Coleman v. Ballandi, 22 Minn. 144; Quackenbush v. Danks, 1 Denio, 128; Danks v. Quackenbush, 3 Denio, 594; 1 N. Y. 129; Cusic v. Douglas, 3 Kan. 123, 87 Am. Dec. 458; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103; Hill v. Kessler, 63 N. C. 437; Martin v. Hughes, 67 N. C. 293; Story v. Furman, 25 N. Y. 214, 223-4; Maxey v. Loyal, 38 Ga. 531; Hardeman v. Downer, 39 id. 425; Sneider v. Heidelberger, 45

having an executory judgment against a city to file a certified copy thereof with the comptroller, preliminary to obtaining a warrant on the treasury in payment, does not impair the obligation, and is constitutional.⁸⁹

An amendment to the charter of Oshkosh, Wisconsin, provided that no suit should be maintained on any claim against the city unless the same was presented to the city council and disallowed, and failure to take action for sixty days was made equivalent to disallowance. And disallowance by the council was made a bar unless an appeal was taken to the circuit court by serving notice of appeal on the city clerk within twenty days, and giving a bond to the city in the sum of \$150, with two sureties, to be approved by the city attorney and city comptroller, conditioned to prosecute the appeal and pay any costs awarded. This was held not to impair a contract previously made between the city and a water company in regard to hydrant rentals, but to be a mere change in the remedy within the power and discretion of the legislature.⁹⁰

Ala. 126; *Mauil v. Vaughn*, id. 134; *Farley v. Dowe*, id. 324; *Rockwell v. Hubbell's Admr.*, 2 Doug. (Mich.) 197; *Sprecher v. Wakeley*, 11 Wis. 432; *In re Kennedy*, 2 S. C. 216; *Breitung v. Lindauer*, 37 Mich. 217.

⁸⁹ *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132.

⁹⁰ *Oshkosh Water Works Co. v. Oshkosh*, 109 Wis. 208, 85 N. W. 376; *Oshkosh Water Works Co. v. Oshkosh*, 187 U. S. 437, 23 S. C. 234. In the latter case the court says: "It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the legislature may not withdraw all remedies, and thus, in

effect, destroy the contract; nor may it impose such new restrictions and conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract." p. 439.

§ 666 (477). A statute, passed after the making of a mortgage, which declared that the equitable estate of the mortgagor should not be extinguished for twelve months after a sale under a decree in chancery, and which prevented any sale unless two-thirds of the amount at which the property had been valued by appraisers should be bid therefor, impaired the obligation of the contract.⁹¹ Taney, C. J., says: "Undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than an old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the constitution."⁹² Laws reducing the rate of interest to be paid on making redemption from

⁹¹ *Bronson v. Kinzie*, 1 How. 311, valid as to existing contracts in 11 L. Ed. 143. *Swinburn v. Mills*, 17 Wash. 611, 50

⁹² A similar statute was held in- Pac. 489, 61 Am. St. Rep. 932.

a foreclosure sale,⁹³ or giving the debtor the right to possession during the period of redemption, instead of the purchaser as before,⁹⁴ are invalid for the same reason. Where a law allowing a sale on foreclosure only after a year from the filing of the bill, but making the sale absolute, was changed so as to allow a sale in six months and give six months for redemption, the change was held not to impair any right, and to be valid, as applied to past mortgages.⁹⁵

In *McCracken v. Hayward*⁹⁶ it was held that a law which provided that a sale should not be made of property levied on under an execution unless it would bring two-thirds of its appraised value was unconstitutional and void. Baldwin, J., delivered the opinion of the court, in the course of which he said: "In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution;

⁹³ *Bauer Grocer Co. v. Zelle*, 172 Ill. 407, 50 N. E. 238.

⁹⁴ *Canadian & Am. Mort. & T. Co. v. Blake*, 24 Wash. 102, 63 Pac. 1100, 85 Am. St. Rep. 946. In *Wilson v. Wold*, 21 Wash. 398, 58 Pac. 223, after a contract was made upon which judgment was afterwards entered and the property sold, the law was changed so as to give the debtor the right of possession instead of the purchaser at execution sale. It was held not to impair any contract. The court says: "The right to the rents and profits of real estate sold upon execution did not result from the contract of indebtedness. It was a matter of legislative favor. It was conferred upon the purchaser at the sale, who might or might not be a party to the contract terminating in the judgment. The statute conferred

the right upon the purchaser regardless of whether he was a party to the contract or not. The enforcement of the contract was not postponed or retarded by the act in question. It deprived the creditor of no remedy, and left his right to collect his debt unimpaired." p. 401. After sale on execution the interest to be paid on making redemption cannot be reduced. *Thresher v. Atchison*, 117 Cal. 73, 48 Pac. 1020, 59 Am. St. Rep. 159.

⁹⁵ *State Savings Bank v. Matthews*, 123 Mich. 56, 81 N. W. 918. The law was held not to apply to a sale made after the act was passed under a decree entered before. *Lachman v. Ottawa Circuit Judge*, 125 Mich. 27, 83 N. W. 1025.

⁹⁶ 2 How. 608, 11 L. Ed. 397.

annulling all state legislation which impaired the obligation, it was left to the states to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right; compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution." In *Edwards v. Kearzey*⁹⁷ it was held that an exemption of a homestead to the value of \$1,000, inserted in a new constitution adopted after a debt was contracted, impaired the obligation of the contract.⁹⁸ Mr. Justice Swayne delivered the opinion of the court, and, alluding to what had been said by the chief justice in *Bronson v. Kinzie* relative to the power of the states to enact exemption laws, said: "The learned chief justice seems to have had in his mind the maxim *de minimis*, etc. Upon no other ground can any exemption be justified. Policy and humanity are dangerous guides in the discussion of a legal proposition"⁹⁹ He who follows them far is apt to bring back the means of error

⁹⁷ 96 U. S. 595, 24 L. Ed. 793.

Gratt. 266, 12 Am. Dec. 507; Less-

⁹⁸ *Gunn v. Barry*, 15 Wall. 610, 21 L. Ed. 212; *Homestead Cases*, 22

ley v. Phipps, 49 Miss. 790.

⁹⁹ See *Von Hoffman v. Quincy*, 4 Wall. 553, 18 L. Ed. 403.

and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it." He concludes with this declaration: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution and is therefore void."

An amendatory act increasing the homestead exemption from \$1,000 to \$1,500 was held not to impair contracts by the supreme court of Utah.¹ At the time a contract was made the law provided that the homestead, upon the debtor's death, should be liable for his debts, subject to homestead rights in the widow and minor children, if any. A new law providing that the homestead should descend to the heirs of the deceased owner, free from all debts or claims upon the estate of the deceased, was held to impair the contract and to be invalid.²

§ 667 (478). Legislation cannot be permitted to affect the construction of existing contracts. It is also held that the parties are entitled to a remedy as efficacious as that afforded when the contract was made. They are entitled to have the identical contract enforced, but not by the precise modes of procedure in force at its execution; only an equivalent remedy. There is some diversity of opinion as to the degree of change or departure from an exact equivalence there may be without conflicting with the constitution. What the suitor has a right to claim is the use of such remedy as may be adequate to his demand; not that he shall be permitted to enforce that demand in any special form or by any specific process.³ No attempt has been made to fix

¹ *Folsom v. Asper*, 25 Utah, 299, 71 Pac. 315. A homestead law was held invalid as impairing contracts in *Long v. Walker*, 105 N. C. 90, 10 S. E. 858.

² *Dunn v. Stevens*, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348.

³ *Tennessee v. Sneed*, 96 U. S. 73, 74, 24 L. Ed. 610.

definitely the line between alterations of the remedy which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights; every case must be determined on its own circumstances.⁴ Statutes taking away all remedy on existing contracts would be manifestly void.⁵ Where the changes introduced are intended and suited to clog, hamper and embarrass the proceedings to enforce the right, so as to destroy it, the statute is not a regulation of the remedy, but impairs the obligation of the contract.⁶ The remedy for the enforcement of a contract to which a party is entitled under state statutes in force when the contract was made cannot be subsequently taken away by decisions of the state courts giving those statutes an erroneous construction, any more than by subsequent legislation.⁷ It has been held that the remedy is within the discretion of the states, and that a stay of execution for a reasonable time is not obnoxious to constitutional objection.⁸ An act passed in Wisconsin in May, 1862, exempting from civil process all persons who had or might volunteer or enroll themselves as members of any military company, mustered into the service of the United States or of that state, during their service, was held to be void as operating to impair the obligation of contracts; that it was within the recognized power of the states to change or modify the laws governing proceedings in courts of justice in regard to past as well as future contracts. That

⁴ Von Hoffman v. Quincy, 4 Wall. 553, 18 L. Ed. 403.

⁵ Call v. Hagger, 8 Mass. 430; State v. Bank, 1 S. C. 63; Osborn v. Nicholson, 13 Wall. 654, 662, 20 L. Ed. 689; West v. Sansom, 44 Ga. 295; Johnson v. Bond, Hempst. 533, Fed. Cas. No. 7374; Rison v. Farr, 24 Ark. 161; McFarland v. Butler, 8 Minn. 116; Jackson v. Butler, id. 117; Ernst Bros. v. Hollis, 89 Ala. 638, 8 So. 122; Bates v. Gregory, 89 Cal. 387, 26 Pac. 891.

⁶ Richardson v. U. S. Mort. & Trust Co., 194 Ill. 259, 62 N. E. 606; State v. Helms, 136 Ind. 122, 35 N. E. 893; Phinney v. Phinney, 81 Me. 450, 17 Atl. 405, 10 Am. St. Rep. 266, 4 L. R. A. 348; Ernst Bros. v. Hollis, 89 Ala. 638, 8 So. 122; Oatman v. Bond, 15 Wis. 20.

⁷ Butz v. Muscatine, 8 Wall. 575, 10 L. Ed. 490.

⁸ Chadwick v. Moore, 8 W. & S. 49, 42 Am. Dec. 287.

power was held to be unrestricted, except that a substantial remedy must be afforded according to the course of justice as it existed at the time the contract was made.⁹ A Pennsylvania act of like nature passed in 1861, and construed to mean a stay during the war or for three years and thirty days, unless it should sooner terminate, was sustained. "In such cases," says Woodward, J., "the rule is that the remedy becomes part of the obligation of the contract, and any subsequent statute which affects the remedy impairs the obligation, and is unconstitutional." *Bronson v. Kinzie*¹⁰ and *Billinger v. Evans*¹¹ are illustrations of this rule. The time and manner in which stay laws shall operate are properly legislative questions, and will generally depend, said Judge Baldwin in *Jackson v. Lamphire*,¹² "on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to the enactment."¹³ The learned judge added: "It is impossible to separate this question of reasonableness from the actual circumstances in which the country found itself at the date of the war. . . . Now, if a stay of execution for three years would not be tolerated in ordinary times, did not these circumstances [then historically known] constitute an emergency that justified the pushing of legislation to the extremest limits of the constitution? . . . In view of the extraordinary circumstances of the case we cannot pronounce it unreasonable. We see in it no wanton or careless disregard of the obligation of contracts. . . . Another circumstance which bears on the reasonableness of the enactment is the provision which suspends all statutes of limitation in favor of the soldier during the time he is exempted from process. The provisions were reciprocal and both were reasonable."¹⁴ Where an indefinite stay was

⁹ *Hasbrouck v. Shipman*, 16 Wis. 296.

¹⁰ 1 How. 311, 322, 11 L. Ed. 143.

¹¹ 4 Wright, 327.

¹² 3 Pet. 280, 7 L. Ed. 679.

¹³ *Breitenbach v. Bush*, 44 Pa. St. 313, 84 Am. Dec. 442.

¹⁴ See *Coxe's Ex'r v. Martin*, 44 Pa. St. 322.

provided for on the consent of two-thirds of the creditors, subject to no other than their discretion, the obligation of the contracts held by the non-consenting minority was impaired.¹⁵

The statutes in force at the time of a tax sale, as to time of redemption, rate of interest to be paid and the like, form part of the contract of sale and cannot be changed after the sale to the prejudice of the purchaser.¹⁶ An act giving priority to a lien for seed grain,¹⁷ or for supplies or wages,¹⁸ is invalid as to prior mortgages. A statute requiring sales to be made under power of sale in mortgages only on the first Tuesday of any month was held invalid as to mortgages executed before the act and which provided for a sale at any time after default.¹⁹ A statute relating to voluntary assignments provided that a debtor might, within ten days after the levy of any process, make an assignment, and that, thereupon, the levy should be dissolved and the property turned over to the assignee. The act was held void as to a levy under a judgment entered on a judgment note prior to the passage of the act.²⁰

A statute directing that execution upon any judgment thereafter obtained should not issue until two years after the rendition of the judgment, unless the plaintiff should indorse upon the execution that satisfaction may be received in notes of particular banks, was held unconstitutional. Such a law attempts to impair the obligation.²¹ An ordi-

¹⁵ *Bunn v. Gorgas*, 41 Pa. St. 441.

¹⁶ *Hall v. State*, 29 Fla. 79, 11 So. 97, 30 Am. St. Rep. 95; *Pounds v. Rogers*, 52 Kan. 558, 35 Pac. 223, 39 Am. St. Rep. 360; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049; *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58.

¹⁷ *Yeatman v. King*, 2 N. D. 421, 51 N. W. 721, 33 Am. St. Rep. 797.

¹⁸ *Crowther v. Fidelity Ins., Trust & Safe Dep. Co.*, 85 Fed. 41, 29 C. C. A. 1.

¹⁹ *Thompson v. Cobb*, 95 Tex. 140, 65 S. W. 1090.

²⁰ *Second Ward Savings Bank v. Schranck*, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569; *Peninsular Lead & Color Works v. Union Oil, etc. Co.*, 100 Wis. 488, 76 N. W. 359, 69 Am. St. Rep. 934, 42 L. R. A. 331; *Eau Claire National Bank v. Macauley*, 101 Wis. 304, 77 N. W. 176.

²¹ *Townsend v. Townsend, Peck*, 1; S. C., 14 Am. Dec. 722. "The contract," says Haywood, J., "is

nance, ostensibly to change the jurisdiction of the courts, provided that all contracts, without regard to the terms of payment made by the parties, should be payable in four

made by the parties, and, if sanctioned by law, it promises to enforce performance should the party decline performance himself. The law is the source of the obligation, and the extent of the obligation is defined by the law in use at the time the contract is made. If this law direct a specific execution, and a subsequent act declares that there shall not be a specific execution, the obligation of the contract is lessened and impaired. If the law in being at the date of the contract gives an equivalent in money, and a subsequent law says the equivalent shall not be in money, such act would impair the obligation of the contract. If the law in being at the date of the contract gives immediate execution on the rendition of the judgment, a subsequent act declaring that the execution shall not issue for two years would lessen or impair the contract equally as much in principle as if it suspended execution forever; in which case the legal obligation of the contract would be wholly extinguished. The legislature may alter remedies, but they must not, so far as regards antecedent contracts, be rendered less efficacious or more dilatory than those ordained by law in being when the contract was made, if such alteration be the direct and special object of the legislature, apparent in an act made for the purpose." See *Farnsworth v. Vance*, 2 Cold. 108; overruled by *Webster v. Rose*, 6

Heisk. 93. A Missouri act extended the time for return of executions to second term after issue, and prohibited sales till within fifteen days of the return day, and from justices' courts for twelve months. This was held unconstitutional. *Stevens v. Andrews*, 31 Mo. 205. In this case Napton, J., said: "We do not question the power of the legislature over remedies, whether they relate to past or future contracts, provided the new remedy does not impair the obligation of the contract. It is the unquestioned power of the legislature to regulate the modes of proceedings in their courts, and prescribe the forms of process, both final and *mesne*, and their manner and time of execution. General laws relating to the modes of proceeding, both before and after judgment, would hardly be called in question, although applied to past contracts, merely because of some incidental effects favorable to the plaintiff or defendant in the suit. . . . The act now under consideration is not designed to make any permanent change in the forms of proceedings heretofore in use. On the contrary, the old system is retained; and the act, without changing the rule, attempts to suspend its operation. It recognizes the propriety of letting executions run for six months as the permanent rule, but it suspends this general regulation for two years and applies the suspension to past contracts." See *Webster v.*

annual instalments. This was held unconstitutional.²² A law which changes the rules of evidence relates to the remedy and is not within the constitutional inhibition.²³ A law abolishing distress for rent has been sustained as applicable to existing leases.²⁴ The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The states may abolish it whenever they think proper.²⁵ A law which takes from a mortgagee a right of possession until after foreclosure;²⁶ a law suspending the right to sue on the note or bond until after foreclosure;²⁷ extending redemption;²⁸ or shortening the redemption,²⁹ impairs the obligation, and is within the prohibition under consideration.

§ 668 (479). Limitation laws relate to the remedy and not directly to the right. They are not considered as ele-

Rose, 6 Heisk. 93; Burt v. Williams, 24 Ark. 91; Hudspeth v. Davis, 41 Ala. 389; Taylor v. Stearns, 18 Gratt. 244; Cutts v. Hardee, 38 Ga. 350; Aycock v. Martin, 37 id. 124; Sequestration Cases, 30 Tex. 688, 98 Am. Dec. 494; Clark v. Martin, 3 Grant's Cas. 393; Johnson v. Higgins, 3 Met. (Ky.) 566.

²² Jacobs v. Smallwood, 63 N. C. 112.

²³ Neass v. Mercer, 15 Barb. 318; Howard v. Moot, 64 N. Y. 262.

²⁴ Van Rensselaer v. Snyder, 9 Barb. 302, 13 N. Y. 299; Guild v. Rogers, 8 Barb. 502; Conkey v. Hart, 14 N. Y. 22.

²⁵ Von Hoffman v. Quincy, 4 Wall. 552, 18 L. Ed. 403; Beers v. Haughton, 9 Pet. 359, 9 L. Ed. 145; Ogden v. Saunders, 12 Wheat. 230, 6 L. Ed. 606; Sturges v. Crowninshield, 4 Wheat. 200, 4 L. Ed. 529.

²⁶ Mundy v. Monroe, 1 Mich. 68; Blackwood v. Van Vleet, 11 id. 252.

²⁷ Boice v. Boice, 27 Minn. 371, 7 N. W. 687.

²⁸ Robinson v. Howe, 13 Wis. 341; Dikeman v. Dikeman, 11 Paige, 484; Greenfield v. Dorris, 1 Sneed, 550; January v. January, 7 T. B. Mon. 542; Goenen v. Schroeder, 8 Minn. 387; Haynes v. Tredway, 133 Cal. 400, 65 Pac. 892; Malone v. Roy, 134 Cal. 344, 66 Pac. 313; Phinney v. Phinney, 81 Me. 450, 17 Atl. 405, 10 Am. St. Rep. 266, 4 L. R. A. 348; State v. Gilliam, 18 Mont. 94, 109, 44 Pac. 394, 45 Pac. 661; State v. Sears, 29 Ore. 580, 43 Pac. 482, 46 Pac. 785, 54 Am. St. Rep. 808; Hollister v. Donahoe, 11 S. D. 497, 78 N. W. 959; Watkins v. Glenn, 55 Kan. 417, 40 Pac. 316; Beverly v. Barnitz, 55 Kan. 451, 40 Pac. 325; S. C. reversed on rehearing, 55 Kan. 466, 42 Pac. 725, 31 L. R. A. 74; Barnitz v. Beverly, 163 U. S. 118, 16 S. C. Rep. 1042, 41 L. Ed. 93, reversing 55 Kan. 466. But see Stone v. Bassett, 4 Minn. 298.

²⁹ Cargill v. Power, 1 Mich. 369.

ments entering into contracts, for, it is said, parties do not look forward to a breach of their agreements, but to the performance.³⁰ A law passed subsequently to a contract and changing the period of limitation is not necessarily a law impairing its obligation.³¹ And ordinarily courts disregard the limitation fixed in the place of the contract or tort and enforce only that of the *lex fori*.³² Usually the bar of a statute limiting transitory actions is said not to extinguish the right, because such actions may be brought anywhere, while the statute can have no effect beyond the territory of the sovereign that enacted it; therefore the right remains to support such action whenever the *lex fori* will permit it to be brought. But even under these statutes, if the subject-matter of an action and the opposing claimants of the right have continued within the same jurisdiction until the statutory term has expired, the title is transferred to him in whose favor the bar exists, and that title will be recognized and upheld in the tribunals of other states as well.³³

§ 669. **Whether judgment a contract.**—A judgment is held not to be a contract within the meaning of the provision in question, and a statute reducing the rate of interest on judgments may apply to existing judgments from the time it goes into effect.³⁴ In *Morley v. Lake Shore & M. S.*

³⁰ *Moore v. State*, 43 N. J. L. 203; *Ogden v. Saunders*, 12 Wheat. 266, 313, 6 L. Ed. 606; *Don v. Lippmann*, 5 Cl. & Fin. 1.

³¹ 3 *Parsons on Cont.* 557.

³² *Moore v. State*, 43 N. J. L. 203; *Gulick v. Loder*, 13 id. 68, 22 Am. Dec. 711; *Townsend v. Jemison*, 9 How. 407, 13 L. Ed. 194; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Drake v. Wilkie*, 30 Hun, 537; *Calhoun v. Kellogg*, 41 Ga. 231.

³³ *Moore v. State*, 43 N. J. L. 203; *Newby's Adm'r v. Blakey*, 3 H. & M. 57; *Brent v. Chapman*, 5 Cr. 358,

3 L. Ed. 125; *Shelby v. Guy*, 11 Wheat. 361, 6 L. Ed. 495; *Thompson v. Caldwell*, 3 Litt. 136; *Story's Conf. L.*, § 582*b*; *Huber v. Steiner*, 2 Bing. N. C. 202; *Don v. Lippmann*, 5 Cl. & Fin. 1; *Brown v. Wilcox*, 14 S. & M. 127; *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325; *Woodman v. Fulton*, 47 Miss. 682; *Spencer v. McBride*, 14 Fla. 403. See *Swickard v. Bailey*, 3 Kan. 507.

³⁴ *Stanford v. Coram*, 28 Mont. 288, — Pac. —; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Wyo-*

Ry. Co.³⁵ the supreme court of the United States says: "After the cause of action, whether a tort or a broken contract, not itself prescribing interest until payment, shall have been merged into a judgment; whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the non-payment of the judgment, or not to do so. When such provision is made by statute the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue. Should the statutory damages for the non-payment of a judgment be determined by a state, either in whole or in part, the owner of a judgment will be entitled to receive and have a vested right to the damages which shall have accrued up to the date of the legislative change, but after that time his rights as to interest or damages are, as when he first obtained his judgment, just what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the state chooses to prescribe.

"It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment if such interest be prescribed by statute, but such duty is created by the statute and not by the agreement of

ming *Nat. Bank v. Brown*, 7 Wyo. C. C. A. 494. And see *Ferry v.*
494, 53 Pac. 291, 75 Am. St. Rep. 935; *Campbell*, 110 Iowa, 290, 81 N. W.
Morley v. Lake Shore & M. S. Ry. 604, 50 L. R. A. 92.
Co., 146 U. S. 162, 13 S. C. Rep. 57, ³⁵ 146 U. S. 162, 169, 170, 13 S. C.
36 L. Ed. 925; *Evans-Snider-Buel* Rep. 57, 36 L. Ed. 925.
Co. v. McFadden, 105 Fed. 293, 44

parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. A judgment is in no sense a contract or agreement between the parties. . . . In *Louisiana v. New Orleans*, 109 U. S. 285, 288, in which it was contended on behalf of an owner of a judgment that it was a contract, and within the protection of the federal constitution as such, it was held that 'the term "contract" is used in the constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other to do, or not to do, certain acts. Mutual assent to its terms is of its very essence.' Where the transaction is not based on any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the constitutional prohibition."

A judgment upon a contract is doubtless protected to the same extent as the contract itself. Such a judgment carries with it all the rights of payment and of enforcing payment which attached to the contract, and these rights cannot be impaired by subsequent legislation.³⁶ But a judgment founded upon a tort or statutory obligation is not so protected and is subject to the will of the legislature, which may take away or destroy the means of payment or enforcement.³⁷ After a judgment has become absolute by lapse of the time allowed for an appeal or writ of error, it is held to

³⁶ *Ralls County Court v. United States*, 105 U. S. 732, 26 L. Ed. 1220; *Louisiana v. St. Martin's Parish*, 111 U. S. 716, 4 S. C. Rep. 648, 28 L. Ed. 574; *Mobile v. Watson*, 116 U. S. 305, 6 S. C. Rep. 398, 29 L. Ed. 620; *East St. Louis v. Underwood*, 105 Ill. 308; *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Raught v. Lewis*, 24 Wash. 47, 63 Pac. 1104.

³⁷ *Garrison v. New York*, 21 Wall. 203, 22 L. Ed. 612; *Louisiana v. New Orleans*, 109 U. S. 285, 288, 3 S. C. Rep. 211; *Freeland v. Williams*, 181 U. S. 405, 413, 9 S. C. Rep. 763, 33 L. Ed. 193; *Winona, etc. R. R. Co. v. Plainview*, 143 U. S. 371, 393, 12 S. C. Rep. 530, 36 L. Ed. 191.

give a vested right which cannot be taken away by a subsequent statute providing for a review or new trial.³⁸

§ 670. Acts held not to impair contracts.—A revenue law provided that railroad companies thereafter building and operating a line of railroad north of parallel forty-four and earning less than a certain sum per mile should be exempt from certain taxes for a period of ten years. This was held not to create a contract with a company which built its line after the passage of the act, but merely to grant a privilege which could be withdrawn at the pleasure of the legislature.³⁹ An act imposing certain penalties upon any tenant who wrongfully continues in possession after a violation by him of the terms of his lease was held to relate to the remedy only and to be valid as applied to existing leases.⁴⁰ At the time school lands were purchased from the state, the statute in force provided for a forfeiture for non-payment upon a judicial ascertainment of the default. A later act provided for such forfeiture by the commissioner of the general land office and gave the purchaser six months after such forfeiture in which to contest the right of forfeiture in court. The later act was held to relate to the remedy and not to impair the contract with the purchaser.⁴¹

³⁸ *Johnson v. Gebbauer*, 159 Ind. 271, 64 N. E. 855; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

³⁹ *Manistee & N. R. R. Co. v. Commissioner of Railroads*, 118 Mich. 349, 76 N. W. 633; *Wisconsin & Mich. Ry. Co. v. Powers*, 191 U. S. 379. In the latter case the court says: "The broad ground in a case like this is that in view of the subject-matter the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with

its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely on the face of the law." p. 387.

⁴⁰ *Woodward v. Winehill*, 14 Wash. 394, 44 Pac. 860.

⁴¹ *Standifer v. Wilson*, 93 Tex. 233, 54 S. W. 898; *Wilson v. Standifer*,

The law last referred to was also held not to impair the contract, where, at the time of purchase, the law did not make any provision for forfeiture.⁴² Making a tax deed *prima facie* evidence of title in the grantee instead of conclusive evidence of the regularity of the proceedings for levying the tax and making the sale was held not to impair the contract of sale.⁴³ So an act making the deeds of executors, administrators and sheriffs *prima facie* evidence of the regularity of all proceedings required by law anterior to such deeds was held to apply to past deeds and to be valid.⁴⁴ An appraisement law does not so enter into the contract that it may not be repealed at any time.⁴⁵ A statute that certificates of purchase issued upon a judicial sale shall be null and void if a deed is not taken out in a specified time was held to apply to sales under prior mortgages and to be valid as so applied.⁴⁶

A provision in a city charter that, after a street has been once improved at the expense of the abutting property, it shall not again be so improved does not constitute a contract with the abutting owner.⁴⁷ A statute forbidding the licensing of a ferry within half a mile of an existing ferry creates no contract with a licensee and may be repealed at the pleasure of the legislature. Such an act ties the hands of the licensing body, not of the legislature.⁴⁸ A statute giving the improver of tide lands a preference to purchase them was held to give the improver no

184 U. S. 399, 22 S. C. Rep. 384, 46 L. Ed. 612.

⁴² Waggoner v. Flack, 188 U. S. 595, 23 S. C. Rep. 345.

⁴³ Harris v. Harsch, 29 Ore. 562, 46 Pac. 141.

⁴⁴ Sauers v. Giddings, 90 Mich. 50, 51 N. W. 265.

⁴⁵ Phelps-Bigelow Windmill Co. v. North Am. Trust Co., 62 Kan. 529, 64 Pac. 63.

⁴⁶ Bradley v. Lightcap, 201 Ill. 511, 66 N. E. 546.

⁴⁷ Ladd v. Portland, 32 Ore. 271, 51 Pac. 654, 67 Am. St. Rep. 526.

⁴⁸ Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 11 S. C. Rep. 301, 34 L. Ed. 967; Williams v. Wingo, 177 U. S. 601, 20 S. C. Rep. 793, 44 L. Ed. 905. In the former case the court says: "It was a gratuitous proceeding on the part of the legislature by which a certain benefit was conferred upon existing ferries, but not accompanied by any condition that

vested or contract right, but a mere privilege which could be withdrawn at the pleasure of the legislature.⁴⁹ A purchaser of tide lands from the state under an act which devoted seventy-five per cent. of the purchase-money to the improvement of the harbor was held to have no contract right to such application of the funds, and a subsequent act diverting such funds to other purposes was held valid.⁵⁰ An act provided that whenever real estate in certain cities had paid a special assessment for a street improvement, it should be exempt from the general road tax to the amount of the assessment paid. It was held to confer a privilege and not a right, and that a repeal of the act destroyed the privilege.⁵¹ An act exempted the hall of the Grand Lodge of F. & A. Masons from taxation so long as it was occupied as a lodge. At the time of the grant the society was in existence and owned the lodge. The grant was held to be a gratuity and subject to revocation.⁵² An act providing that county boards may regulate water rates, but shall not reduce them below a certain point, is a limitation upon the power of such boards and does not make a contract with companies supplying water that the state will not make or authorize lower rates.⁵³

A statute increasing the penalty for usury *received* applies to usury received after the act upon a contract made before.⁵⁴ An act regulating sales under powers in mortgages and expressly applying to past as well as future mortgages was held valid in Minnesota.⁵⁵

made the act take the character of a contract. It was a matter of ordinary legislation, subject to be repealed at any time when, in the judgment of the legislature, the public interest should require the repeal." p. 292.

⁴⁹ *Allen v. Forest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606.

⁵⁰ *Tacoma Land Co. v. Young*, 18 Wash. 495, 52 Pac. 244.

⁵¹ *Miller v. Hageman*, 114 Iowa, 195, 86 N. Y. 281.

⁵² *Grand Lodge v. New Orleans*, 166 U. S. 143, 17 S. C. Rep. 523, 41 L. Ed. 951.

⁵³ *Stanislaus County v. San Joaquin, etc. Canal & Irr. Co.*, 192 U. S. 201.

⁵⁴ *Hardin v. Trimmier*, 27 N. C. 110, 3 S. E. 46.

⁵⁵ *Webb v. Lewis*, 45 Minn. 285, 47 N. W. 803.

§ 671 (480). **Vested rights inviolable.**—Vested rights cannot be destroyed, divested or impaired by direct legislation. Their protection is one of the primary purposes of government. They are secured by the bill of rights and the constitutional limitations upon the exercise of the sovereign powers.⁵⁶ There is a vested right in property which one owns, and it cannot be legislated away.⁵⁷ A vested right is property as tangible things are when they spring from contract or the principles of the common law.⁵⁸ There is a vested right in an accrued cause of action;⁵⁹ in a defense to

⁵⁶ *Wilson v. Wall*, 34 Ala. 288; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Baughner v. Nelson*, 9 Gill, 299, 52 Am. Dec. 694; *Maxwell v. Goetschius*, 40 N. J. L. 383; *Collins v. East Tenn. etc. R. R. Co.*, 9 Heisk. 841; *Dash v. Van Kleeck*, 7 John. 477, 5 Am. Dec. 291; *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325; *Dodge v. County of Platte*, 16 Hun, 285; *Wood v. Mayor, etc.*, 34 How. Pr. 501; *State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570; *Smith v. Louisville, etc. R. R. Co.*, 62 Miss. 510; *Halloran v. T. etc. R. R. Co.*, 40 Tex. 465; *Aldridge v. Tuscumbia, etc. R. R. Co.*, 2 St. & P. 199, 23 Am. Dec. 307; *Boatwright v. Faust*, 4 McCord, 439; *Municipality No. 3 v. Michoud*, 6 La. Ann. 605; *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Coosa R. Co. v. Barclay*, 30 Ala. 120; *Dillon v. Dougherty*, 2 Grant's Cas. 99; *State v. Squires*, 26 Iowa, 340; *Smith v. Van Gilder*, 26 Ark. 527; *In re Beecher's Estate*, 113 Mich.

667, 72 N. W. 1; *Dunn v. Dewey*, 75 Minn. 153, 77 N. W. 793; *Butte & B. Con. Min. Co. v. Montana Ore Purchasing Co.*, 25 Mont. 41, 63 Pac. 825; *People v. Ryder*, 124 N. Y. 500, 26 N. E. 1040; *Matter of Southern Boulevard R. R. Co.*, 58 Hun, 497, 12 N. Y. S. 466; *McCann v. New York*, 52 App. Div. 358, 65 N. Y. S. 308; *Whitworth v. McKee*, 32 Wash. 83, — Pac. —; *H. W. Wright L. Co. v. Hixon*, 105 Wis. 153, 80 N. W. 1110.

⁵⁷ *Lane v. Nelson*, 79 Pa. St. 407; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570; *Norman v. Heist*, 5 W. & S. 171, 40 Am. Dec. 493; *Aldridge v. Tuscumbia, etc. R. R. Co.*, 2 Stew. & Port. 199, 23 Am. Dec. 307; *This-tle v. Frostburg Coal Co.*, 10 Md. 129.

⁵⁸ *Collins v. East Tenn. etc. R. R. Co.*, 9 Heisk. 841; *Dillon v. Dougherty*, 2 Grant's Cas. 99; *Ryan v. Chicago & N. W. Ry. Co.*, 101 Wis. 506, 77 N. W. 894; *Gladney v. Syn-dnor*, 172 Mo. 318, 72 S. W. 554.

⁵⁹ *Norris v. Tripp*, 111 Iowa, 115, 82 N. W. 610; *Tufts v. Tufts*, 8 Utah, 142, 30 Pac. 309; *Pinkum v.*

a cause of action;⁶⁰ even in the statute of limitations when the bar has attached, by which an action for a debt is barred.⁶¹ That statute presumes evidence from length of time which cannot now be produced; payment which cannot now be proved.⁶² A person in adverse possession is no longer subject to action to disturb him; the one has a vested right to his defense, and the other a title with all its incidents and implications.⁶³ And it is then secure against legislative interference.⁶⁴ An act requiring parties claiming an adverse possession to give a certain notice is not unconstitutional as applied to those whose possession had begun but had not ripened into title before the passage of the act.⁶⁵

Eau Claire, 81 Wis. 301, 51 N. W. 550; Smith v. Louisville, etc. R. R. Co., 62 Miss. 510.

⁶⁰ Davis v. Minor, 1 How. (Miss.) 183, 28 Am. Dec. 325.

⁶¹ Peiser v. Griffen, 125 Cal. 9, 57 Pac. 690; Massachusetts Mut. Life Ins. Co. v. Colorado L. & T. Co., 20 Colo. 1, 36 Pac. 793; Board of Education v. Blodgett, 155 Ill. 441, 40 N. E. 1025, 46 Am. St. Rep. 348; Flynn v. Lemieux, 46 Minn. 458, 49 N. W. 238; Whitney v. Wegler, 54 Minn. 235, 55 N. W. 927; Nichols v. Cass, 65 N. H. 212, 23 Atl. 430; Eingartner v. Illinois Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871. Compare Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59; Danforth v. Groton Water Co., 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495; Dunbar v. Boston & P. R. R. Co., 181 Mass. 383, 63 N. E. 916. And see *post*, § 708.

⁶² Davis v. Minor, 1 How. (Miss.) 183, 28 Am. Dec. 325.

⁶³ Knox v. Cleveland, 13 Wis. 249; Moore v. Luce, 29 Pa. St. 260, 72

Am. Dec. 629; Leffingwell v. Warren, 2 Black, 599, 17 L. Ed. 261.

⁶⁴ Moore v. State, 43 N. J. L. 207; Maxwell v. Goetschius, 40 id. 383. A statute provided that by particular pleading a borrower might defend against a usurious loan to the extent of the usury. It was regarded as remedial, and though imposing a duty to pay the loan and lawful interest in accordance with the debtor's equitable duty, and made to operate retrospectively in derogation of the statute in force when the loan was made by which the contract was unlawful, it was held not obnoxious to the objection that it took away a vested right, for it was said there could be no vested right to do wrong. Baugher v. Nelson, 9 Gill, 299, 52 Am. Dec. 694; Town of Danville v. Pace, 25 Gratt. 1, 18 Am. Rep. 663; Satterlee v. Mathewson, 16 S. & R. 191; The Ironsides, Lushington, 458.

⁶⁵ Scales v. Otto, 127 Ala. 582, 29 So. 63.

But such a statute was held not to apply to a case where the possession had ripened into title under prior acts.⁶⁶

If a contract when made is a nullity, it cannot be validated by an act of the legislature, for that would be to impose a binding agreement where none existed.⁶⁷ A right of redemption once vested is a property right which can only be taken by due process of law; it cannot be abrogated by a legislative act.⁶⁸ A lien or other right once attached cannot be destroyed by repeal of the law under which it was derived.⁶⁹ After a tax has been legally remitted it cannot be reimposed.⁷⁰ In *First National Bank v. Covington*⁷¹ the opinion is expressed that the legislature cannot, by a retroactive law, impose taxes upon property for past years which was not taxable for those years under any valid law. When a right has been perfected by judgment the fruits of recovery cannot be diverted by new legislation,⁷² nor subjected to new hazard by reviving a new right to appeal,⁷³ or some

⁶⁶ *Alabama State Land Co. v. Beck*, 108 Ala. 71, 19 So. 802.

⁶⁷ *New York, etc. R. R. Co. v. Van Horn*, 57 N. Y. 473; *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379; *Andrews v. Bean*, 15 R. L. 451, 8 Atl. 540.

⁶⁸ *Willis v. Jelineck*, 27 Minn. 18, 6 N. W. 373.

⁶⁹ *Appeal Tax Court v. Western R. R. Co.*, 50 Md. 274; *Warren v. Jones*, 9 S. C. 288; *Daniels v. Moses*, 12 S. C. 130; *Walton v. Dickerson*, 4 Rich. L. 568; *Waters v. Dixie Lumber & Mfg. Co.*, 106 Ga. 592, 32 S. E. 636, 71 Am. St. Rep. 281; *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 81 Am. St. Rep. 715; *Garneau v. Post Blakeley Mill Co.*, 8 Wash. 467, 36 Pac. 463; *State Trust Co. v. Kansas City, etc. R. R. Co.*, 115 Fed. 367. But see *Will-*

iams v. Hutchinson, etc. Ry. Co., 62 Kan. 412, 63 Pac. 430, 84 Am. St. Rep. 408; *post*, §§ 690-692. The repeal of a general corporation law by a statute substantially re-enacting and extending its provisions does not affect the existence of corporations organized under it. *United Hebrew B. Ass'n v. Benshimol*, 130 Mass. 325.

⁷⁰ *Municipality No. 3 v. Michoud*, 6 La. Ann. 605.

⁷¹ 103 Fed. 523.

⁷² *Gilman v. Tucker*, 128 N. Y. 190, 28 N. E. 1040, 26 Am. St. Rep. 464, 13 L. R. A. 304; *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123; *Commonwealth v. Welch*, 2 Dana, 330.

⁷³ *Hooker v. Hooker*, 10 Sm. & M. 599; *Halloran v. T. & N. etc. R. R. Co.*, 40 Tex. 465; *Burch v. Newbury*,

other mode of review.⁷⁴ An act cannot affect the construction of the will of a testator who died before it was passed.⁷⁵ Rights of a husband in the property of the wife when vested cannot be impaired by subsequent legislation.⁷⁶ Treaties are the supreme law of the land; rights which have vested under them cannot be destroyed or affected by the action of either the legislative or the executive department of the government, nor by the rules of practice adopted by the officers of the latter department; nor are the courts in determining those rights to be controlled by the action or rules of practice of the other departments.⁷⁷ It is not within the power of the legislature to create a legal liability out of a past transaction, for which none arose by the law as it stood at the time of its occurrence.⁷⁸

10 N. Y. 374; *Oliver v. Lewis*, 9 Wash. 572, 38 Pac. 139; *Dyer v. Belfast*, 88 Me. 140, 33 Atl. 790; *German Savings Bank v. Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33.

⁷⁴ *Stewart v. Davidson*, 10 Sm. & M. 351; *Johnson v. Johnson*, 52 Md. 668; *Gompf v. Wolfinger*, 67 Ohio St. 144, 65 N. E. 878, citing many cases.

⁷⁵ *Boatwright v. Faust*, 4 McCord, 439. Statutes prescribing the requisites to be observed in making a will may be made to operate upon wills already made where the testator dies afterwards. *Sutton v. Chenault*, 18 Ga. 1; *Wynne v. Wynne*, 2 Swan, 405. So its provisions may be controlled and their validity affected by legislation intermediate the execution of the will and the death of the testator. *Magruder v. Carroll*, 4 Md. 335. See *Blackman v. Gordon*, 2 Rich. Eq. 43, 44 Am. Dec. 241. Congress has power to authorize by special act the extension of a patent, notwith-

standing the fact that the original patent had previously expired and the invention has been introduced to public use. A special act of congress authorizing the extension of a particular patent should be read and construed in connection with the general acts on the subject of patents. *Jordan v. Dobson*, 2 Abb. (U. S.) 398, Fed. Cas. No. 7519.

⁷⁶ *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *Bouknight v. Epting*, 11 S. C. 71; *Beavers v. Myar*, 68 Ark. 333, 58 S. W. 40; *Rose v. Rose*, 104 Ky. 48, 46 S. W. 524, 84 Am. St. Rep. 430; *Graves v. Wood*, 87 Mo. App. 92; *Allen v. Colburn*, 65 N. H. 37, 17 Atl. 1060, 23 Am. St. Rep. 20.

⁷⁷ *Wilson v. Wall*, 34 Ala. 288. See *Hauensteine v. Lynham*, 28 Gratt. 62.

⁷⁸ *Steele v. Steele*, 64 Ala. 438; *Coosa R. Co. v. Barclay*, 30 id. 120; *Frasier v. Town of Tompkins*, 30 Hun, 163; *N. Y. etc. R. Co. v. Van Horn*, 57 N. Y. 473; *Sutherland v. De*

§ 672. Illustrations.—The repeal of a statute does not affect rights vested under it.⁷⁹ An act authorized the common council of a city to audit and adjust the amount of damages done to the relator's property by a local improvement, and directed that when the amount was fixed it should be raised and paid over to the relator. An appraisal was made and confirmed by order of court in accordance with the act on February 13, 1891, and on March 3 following the act was repealed. It was held that the confirmation gave a vested right to the damages awarded which the legislature could not take away, and which the repeal, therefore, did not affect.⁸⁰ Where an applicant for the purchase of tide lands had complied with all existing laws so as to be entitled to a contract, it was held that he had a vested right to such contract which was not affected by a repeal of the law.⁸¹ Where an assignment had been made under an insolvency law and a receiver appointed by the court, it was held that the property thereupon vested in the receiver for the benefit of creditors, with the right to have the estate administered according to the law under which the assignment was made, and a repeal of the law was held not to affect these rights.⁸²

An act which authorized the court, after final judgment for divorce in favor of the wife, to annul or modify the provisions for the support of the wife and the education of the children, and which was expressly made applicable to all judgments, whether rendered before or after the passage of the act, was held void as to past judgments as destroying

Leon, 1 Tex. 250; Grand Rapids v. County v. Oneida County, 80 Wis. Lake Shore, etc. R. R. Co., 130 Mich. 267, 50 N. W. 344.
238. 89 N. W. 932.

⁷⁹ Commonwealth v. Newcomb, N. Y. 300, 35 N. E. 485, 37 Am. St. 109 Ky. 18, 58 S. W. 445; Hanscom 563.

v. Meyer, 61 Neb. 798, 86 N. W. 381; ⁸¹ State v. Bridges, 22 Wash. 64, Thompson v. West, 59 Neb. 677, 82 60 Pac. 60, 79 Am. St. Rep. 914.

N. W. 13, 49 L. R. A. 337; Lincoln ⁸² Ewing v. Van Wagenen, 6 Wash. 39, 32 Pac. 1009.

vested rights.⁸³ An occupying claimant's law provided that the owner should pay into court for the occupant the amount awarded the latter for improvements within one year from the verdict or that title should vest in the occupant. The verdict was held to give a vested right which could not be impaired by a law passed during the year, which extended the time for payment to one year from the judgment.⁸⁴

There is no vested right in a statutory right of appeal and such right may be taken away after it accrues and before the appeal is perfected,⁸⁵ or after the appeal is perfected and pending in the appellate court.⁸⁶ A statute giving a right of appeal where none existed before is not invalid as applied to pending suits or existing causes of action.⁸⁷

It is held that the right to redeem from a tax sale according to the law in force when the sale was made is a vested right and that the legislature cannot burden the right, after the sale, with new and more onerous conditions.⁸⁸ A statute increasing the interest or penalties on delinquent taxes may apply to taxes already levied or delinquent.⁸⁹ So of a statute changing the mode of advertising a tax sale.⁹⁰

A debtor has no vested right in exemptions, and an exemption existing when a contract was made may be taken

⁸³ *Livingston v. Livingston*, 74 App. Div. 261, 77 N. Y. S. 476; *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123.

⁸⁴ *Craig v. Dunn*, 47 Minn. 59, 49 N. W. 396.

⁸⁵ *United States v. O'Neal*, 10 App. Cas. (D. C.) 205; *Leavenworth Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114; *Bailey v. Kincaid*, 57 Hun, 516, 11 N. Y. S. 294; *Davison v. Brown*, 93 Wis. 85, 67 N. W. 42.

⁸⁶ *Harrison v. Smith*, 2 Colo. 625; *Smith v. District Court*, 4 Colo. 475; *Callahan v. Jennings*, 16 Colo. 471, 27 Pac. 1035; *McClain v. Will-*

iams, 10 S. D. 336, 73 N. W. 74, 43 L. R. A. 289; *Ex parte McCordle*, 7 Wall. 506, 19 L. Ed. 264.

⁸⁷ *Lovell v. Davis*, 52 Mo. App. 342; *Smeaton v. Martin*, 82 Wis. 76, 51 N. W. 1090.

⁸⁸ *Teralty Land & Water Co. v. Shaffer*, 116 Cal. 518, 48 Pac. 613, 58 Am. St. Rep. 194. See *League v. State*, 93 Tex. 553, 57 S. W. 34.

⁸⁹ *Webster v. Auditor-General*, 121 Mich. 668, 80 N. W. 705; *New Whatcom v. Roeder*, 22 Wash. 570, 61 Pac. 767.

⁹⁰ *Du Bignon v. Brunswick*, 106 Ga. 317, 32 S. E. 102.

away by a subsequent statute.⁹¹ A statute giving remaindermen the right to have partition of the estate, subject to the life estate, and to have the estate sold, if partition is impracticable, does not interfere with vested rights.⁹² An act of congress provided for appeals from certain *quasi*-judicial tribunals in the Indian Territory to the federal court of the territory and made the judgment of the court final. A later act provided for an appeal from the territorial court to the supreme court in cases involving the question of citizenship in a tribe and in cases between a tribe and the United States and made the act applicable to judgments previously rendered. It was held not to impair vested rights. The mere expectation of a share in the lands of the tribe in case of distribution was held not to be a vested right.⁹³ A code of the District of Columbia, going into effect January 1, 1902, permitted divorces for adultery only, but saved any right accrued and any civil suit or proceeding commenced before that date. A divorce suit for a cause other than adultery, which was commenced before the code went into effect, was dismissed afterwards on the ground that it was not within the saving clause. The case was appealed, and while the appeal was pending congress passed an act providing that all petitions for divorce pending on December 31, 1901, might be proceeded with and disposed of under the statutes then in force. The judgment of dismissal was reversed.⁹⁴

An Iowa statute provided that building and loan associations could enforce loans, though made at a usurious rate, to the extent of twelve per cent. interest, and the act was made to apply to existing contracts. A loan made before the statute and in existence at the time of its passage was renewed afterwards. Still later the act was repealed. In a suit to foreclose the loan it was held that such associations

⁹¹ *Leak v. Gay*, 107 N. C. 468, 12 S. E. 251, 312. 174 U. S. 445, 19 S. C. Rep. 722, 43 L. Ed. 1041.

⁹² *Gillespie v. Allison*, 115 N. C. 542, 20 S. E. 627.

⁹⁴ *Dabney v. Dabney*, 20 App. Cas. (D. C.) 440.

⁹³ *Stephens v. Cherokee Nation*,

acquired a vested right in the privileges granted by the act as to loans made before its repeal which was not affected by such repeal.⁹⁵ Rights of legatees become vested on the probate of the will and relate back to the death of the testator and cannot be affected by legislation subsequent to such death, as by an act giving the widow greater rights in the estate.⁹⁶

§ 673 (481). Imperfect and inchoate rights are subject to future legislation and may be extinguished while in that condition,⁹⁷ but such statutes, and others which involve expense or interfere with the existing course of business, will not be construed to affect such rights or existing cases, or impose new duties or disabilities in respect of past transactions, unless the intention to do so is clearly expressed — even remedial statutes.⁹⁸ Where a claim or cause of action

⁹⁵ *Edworthy v. Iowa L. & S. Ass'n*, 114 Iowa, 220, 86 N. W. 315. The court says: "The general assembly may take away by statute what was given by statute, but not so as to disturb rights vested under the former law. It does not seem to make any difference in the rule that the grant by the general assembly was gratuitous. . . . To sum up our conclusions, we may say that, as originally made, this mortgage contract was for the payment of the rate of interest now sought to be collected. The statute against usury, however, barred its enforcement in the creditor's favor. The curative act removed this bar, being somewhat in the nature of a grant of a right or power to defendant, giving to it the benefits which the parties had agreed upon. To take away this right or power is to divest a right which accrued on the taking effect of such act. The curative statute was in the nature

of a contract between the state and the defendant, and being such, it was out of the power of the general assembly afterwards to impair it."

⁹⁶ *Jochem v. Dutcher*, 104 Wis. 611, 80 N. W. 949. To same effect: *State v. Superior Court*, 21 Wash. 186, 57 Pac. 337.

In the following cases acts were held void as interfering with vested rights: *Taylor v. Deveau*, 100 Mich. 581, 59 N. W. 250; *Dawson v. Peter*, 119 Mich. 274, 77 N. W. 997; *Forster v. Forster*, 129 Mass. 559; *McCord v. Sullivan*, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561.

⁹⁷ *Cage v. Hogg*, 1 Humph. 48; *Tivey v. People*, 8 Mich. 128; *Wistar v. Foster*, 46 Minn. 484, 49 N. W. 247, 24 Am. St. Rep. 241.

⁹⁸ *State v. Bradford*, 36 Ga. 422; *Bond v. Munro*, 28 id. 597; *The Ironsides*, Lush. 458; *Allhusen v. Brookings*, L. R. 26 Ch. Div. 564; *Evans v. Williams*, 2 Drewry & Sm. 334; *Marsh v. Higgins*, 9 C. B. 551;

is founded solely upon a statute, a repeal of the statute before judgment prevents its enforcement and it falls to the ground.⁹⁹ And as such a right may be abolished by a repeal of the statute, so any new conditions may be annexed to the enforcement of the right.¹

§ 674 (482). Remedial statutes may apply to past transactions and pending cases.²—Where statutory relief is prescribed for a cause which is continuous in its nature, as a statute of limitations, or desertion for a certain time as ground for divorce, if the cause continues after the statute goes into effect, the future continuance of the cause may be

Waugh v. Middleton, 8 Ex. 352; 161, 63 Pac. 321; St. Croix Lumber Green v. Anderson, 39 Miss. 359. Co. v. Mitchell, 6 Dak. 215, 50 N.

⁹⁹Globe Publishing Co. v. State Bank, 41 Neb. 175, 59 N. W. 683, 77 L. R. A. 854; Hilliard v. Roche, 2 Pa. Co. Ct. 174; Lawrence County v. New Castle, 18 Pa. Supr. Ct. 313.

¹Daniels v. Racine, 98 Wis. 649, 74 N. W. 553.

²Ludeling v. His Creditors, 4 Martin (N. S.), 603; Carnes v. Parish of Red River, 29 La. Ann. 608; Kimbray v. Draper, L. R. 3 Q. B. 160; Wright v. Hale, 6 H. & N. 227; Singer v. Hasson, 50 L. T. 326; Excelsior Manu'g Co. v. Keyser, 62 Miss. 155; Garrison v. Cheeney, 1 Wash. T'y, 489; Gardenhire v. McCoombs, 1 Sneed, 83; Johnson v. Kooockogey, 23 Ga. 183; Lockett v. Usry, 28 id. 345; Eskridge v. Ditmars, 51 Ala. 245; Sumner v. Miller, 64 N. C. 688; Bailey v. R. R. Co., 4 Harr. 389, 44 Am. Dec. 593; Berry v. Clary, 77 Me. 483, 1 Atl. 360; Costa Rica v. Erlanger, L. R. 3 Ch. Div. 69; Duanesburgh v. Jenkins, 57 N. Y. 191; Tutwiler v. Tuska-loosa Coal, Iron & L. Co., 89 Ala. 391, 7 So. 398, 18 Am. St. Rep. 116; People v. District Court, 28 Colo.

W. 624; Johnson v. Bradstreet Co., 87 Ga. 79, 13 S. E. 250; Pritchard v. Savannah, etc. R. R. Co., 87 Ga. 294, 13 S. E. 493, 14 L. R. A. 721; Moore v. Ripley, 106 Ga. 556, 32 S. E. 647; Woods v. Soucy, 166 Ill. 407, 47 N. E. 67; Mayne v. Board, 123 Ind. 182, 24 N. E. 80; Allerton v. Monona County, 111 Iowa, 560, 82 N. W. 922; McFarland v. Burton, 89 Ky. 294, 12 S. W. 336; Judd v. Judd, 125 Mich. 228, 84 N. W. 134; Tompkins v. Forrestal, 54 Minn. 119, 55 N. W. 813; Perry v. Minneapolis St. Ry. Co., 69 Minn. 165, 72 N. W. 55; Anderson v. Seymour, 70 Minn. 358, 73 N. W. 171; People v. Coyle, 55 App. Div. 223, 66 N. Y. S. 827; Matter of Ludlow Street, 59 App. Div. 180, 68 N. Y. S. 1046; Henry v. Henry, 31 S. C. 2, 9 S. E. 726; Flagg v. Locke, 74 Vt. 320, 52 Atl. 424; Lackland v. Davenport, 84 Va. 638, 5 S. E. 540; Rogers v. Trumbull, 32 Wash. 211; Raymond v. Sheboygan, 76 Wis. 335, 45 N. W. 125; Kick v. Doerste, 45 Mo. App. 134; Bredenburg v. Bardin, 36 S. C. 197, 15 S. E. 372.

supplemented by the time it was continuous immediately before the act was passed to constitute the statutory period.³ No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights.⁴ Where a new statute deals with procedure only, *prima facie* it applies to all actions — those which have accrued or are pending, and future actions.⁵ What was before a subject of equitable relief may be made triable by jury without affecting vested rights.⁶ If before final decision a

³ *McCraney v. McCraney*, 5 Iowa, 232, 68 Am. Dec. 702; *Benkert v. Benkert*, 32 Cal. 467; *Thornburg v. Thornburg*, 18 W. Va. 522; *Spencer v. McBride*, 14 Fla. 403; *Ross v. Duval*, 13 Pet. 45, 10 L. Ed. 51; *Hare v. Hare*, 10 Tex. 355; *Greenlaw v. Greenlaw*, 12 N. H. 200; *Clark v. Clark*, 10 id. 391; *Crossman v. Crossman*, 33 Ala. 486; *Bailey v. Bailey*, 21 Gratt. 43; *Skillman v. Chicago, etc. Ry. Co.*, 78 Iowa, 404, 43 N. W. 275, 16 Am. St. Rep. 452.

⁴ *Id.*

⁵ *Chaffe v. Aaron*, 62 Miss. 29; *Wright v. Hale*, 6 H. & N. 227; *Edmonds v. Lawley*, 6 M. & W. 285; *Kimbray v. Draper*, L. R. 3 Q. B. 160; *Lawrence R. R. Co. v. Mahoning Co.*, 35 Ohio St. 1; *Matter of Beams*, 17 How. Pr. 459; *Sampeyreac v. United States*, 7 Pet. 223, 8 L. Ed. 665; *Dobbins v. Bank*, 112 Ill. 553; *People v. Tibbets*, 4 Cow. 384; *People v. Supervisors*, 63 Barb. 83; *Lane v. Nelson*, 79 Pa. St. 407; *Gardner v. Lucas*, L. R. 3 App. Cas. 583; *People v. Peacock*, 98 Ill. 172; *Rockwell v. Hubbell*, 2 Doug. (Mich.) 197; *Henschall v. Schmidt*, 50 Mo. 454; *Jacquins v. Clark*, 9 Cush. 279; *Blair v. Cary*, 9 Wis. 543; *Commonwealth v. Bradley*, 16 Gray, 241; *Walston v. Common-*

wealth, 16 B. Mon. 15; *McNamara v. Minn. etc. R. R. Co.*, 12 Minn. 388; *Rivers v. Cole*, 38 Iowa, 677; *Hubbard v. New York, etc. R. R. Co.*, 70 Conn. 563, 40 Atl. 533; *Baker v. Smith*, 91 Ga. 142, 16 S. E. 967; *Jensen v. Fricke*, 133 Ill. 171, 24 N. E. 515; *Chicago & Western Ind. R. R. Co. v. Guthrie*, 192 Ill. 579, 61 N. E. 658; *McNamar v. Schwaniger*, 106 Ky. 1, 49 S. W. 1061; *Lazarus v. Met. El. Ry. Co.*, 145 N. Y. 581, 40 N. E. 240; *Lazarus v. Met. El. R. R. Co.*, 83 Hun, 553, 32 N. Y. S. 48; *People v. Lyons*, 29 App. Div. 174, 51 N. Y. S. 811; *Defendorf v. Defendorf*, 42 App. Div. 166, 59 N. Y. S. 163; *First Methodist Epis. Church v. Fadden*, 8 N. D. 162, 77 N. W. 615; *Fish v. Chicago, etc. Ry. Co.*, 82 Minn. 9, 84 N. W. 458, 83 Am. St. Rep. 393; *Daggo v. Orient Ins. Co.*, 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227; *Judkins v. Tuffee*, 21 Ore. 89, 27 Pac. 221; *Kettle v. Reading Iron Works*, 134 Pa. St. 225, 19 Atl. 547; *Lane v. White*, 140 Pa. St. 99, 21 Atl. 437; *Krause v. Pennsylvania R. R. Co.*, 19 Phila. 436; *Murray v. Matison*, 63 Vt. 479, 21 Atl. 532; *Campbell v. Iron Silver Min. Co.*, 83 Fed. 643, 27 C. C. A. 646.

⁶ *Schuremann v. Union Central*

new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings.⁷ But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened.⁸ If what has been done under the old law is bad or insufficient under that law it remains so, though it would have been good if done in the same way under the new law.⁹ A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist.¹⁰ Every case must to a considerable extent depend on its own circumstances. General words in remedial statutes may be applied to past transactions and pending cases, according to

Life Ins. Co., 165 Mo. 641, 65 S. W. 743.

⁷ *Ludeling v. His Creditors*, 4 Martin (N. S.), 603; *Scott v. Duke*, 3 La. Ann. 253; *Commercial Bank v. Markham*, id. 698; *Featherstonh v. Compton*, 8 id. 285; *State v. Brown*, 30 id. 78; *Tennant v. Brookover*, 12 W. Va. 337; *Oliver v. Morton Co.*, 117 Iowa, 43, 90 N. W. 510.

⁸ *Culver v. Woodruff Co.*, 5 Dill. 392, Fed. Cas. No. 3469; *Ewing's Case*, 5 Gratt. 701; *Trist v. Cabenas*, 18 Abb. Pr. 143; *Womack v. Womack*, 17 Tex. 1; *Litch v. Brotherson*, 25 How. Pr. 416; *Tennant v. Brookover*, 12 W. Va. 337; *Newsom v. Greenwood*, 4 Ore. 119; *State v. Solomons*, 3 Hill (S. C.), 96; *Bates v. Stearns*, 23 Wend. 482; *Bedford v. Shilling*, 4 S. & R. 401, 8 Am. Dec. 718; *Butler v. Palmer*, 1 Hill, 324; *Williams v. Smith*, 4 H. & N. 559; *Palmer v. Conly*, 4 Denio, 374; *Satterlee v. Matthew-*

son, 2 Pet. 380, 7 L. Ed. 458; *Hannover Nat. Bank v. Johnson*, 90 Ala. 549, 8 So. 42.

⁹ *Woodham v. Anderson*, 32 Wash. 500.

¹⁰ *Anonymous*, 2 Stew. 228; *Commonwealth v. Hall*, 97 Mass. 570; *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 108; *Davis v. Branch Bank*, 12 Ala. 463; *Coosa R. Co. v. Barclay*, 30 Ala. 120; *City v. R. R. Co.*, 35 La. Ann. 679; *Buckley, Ex parte*, 53 Ala. 43; *Society, etc. v. Wheeler*, 2 Gall. 139, Fed. Cas. No. 13,156; *Lea v. Iron Belt Mercantile Co.*, 119 Ala. 271, 25 So. 28; *Robinson v. Ferguson*, 119 Iowa, 325, 93 N. W. 350; *Shaw & Ellsworth Mfg. Co. v. Kilbourne B. & S. Co.*, 80 Minn. 125, 83 N. W. 36; *London & N. W. Am. Mort. Co. v. St. Paul Imp. Co.*, 84 Minn. 144, 86 N. W. 872; *Persons v. Gardner*, 42 App. Div. 490, 59 N. Y. S. 463; *Richardson v. Fletcher*, 74 Vt. 417.

all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness and justice.¹¹

An act which permits an action of assumpsit in certain cases where it did not lie before cannot be applied to sustain a pending suit.¹² So a general law passed under a constitutional amendment providing for the drainage of lands for agricultural purposes cannot be applied to sustain proceedings begun under a prior law, which permitted drainage for the promotion of the public health only.¹³ The following were held to apply to pending suits and proceedings: An act excluding the period of non-residence from the time within which suit may be brought;¹⁴ an amendment that a special tax for a local improvement shall not exceed the benefits conferred;¹⁵ a statute permitting the recovery of only actual damages in certain cases in lieu of double damages as before.¹⁶ A statute provided for review by a court of assessments on complaints, with power to require the amount erroneously assessed to be deducted. After an application had been made and proof taken, the law was changed. It was held that the new act did not apply to pending cases.¹⁷ When a verdict was rendered the statute in force provided that judgment should go for the amount found due with interest from the date of the judgment. Before judgment was entered the statute was changed so as to provide for interest from the date of the verdict. The

¹¹ *Tilton v. Swift*, 40 Iowa, 78; *Miller v. Graham*, 17 Ohio St. 1; *Riggins v. State*, 4 Kan. 173; *State v. Smith*, 38 Conn. 397; *Mabry v. Baxter*, 11 Heisk. 682; *Mann v. McAttee*, 37 Cal. 11; *Chaney v. State*, 31 Ala. 343; *Merwin v. Ballard*, 66 N. C. 398; *Simco v. State*, 8 Tex. App. 406; *Bradford v. Barclay*, 42 Ala. 375; *Duanesburgh v. Jenkins*, 57 N. Y. 191.

¹² *Bedier v. Fuller*, 116 Mich. 126, 74 N. W. 506.

¹³ *Matter of Penfield*, 3 App. Div. 30, 37 N. Y. S. 1056.

¹⁴ *Bates v. Cullum*, 177 Pa. St. 633, 35 Atl. 861, 55 Am. St. Rep. 753, 34 L. R. A. 440.

¹⁵ *Fahnestock v. Peoria*, 171 Ill. 454, 49 N. E. 496.

¹⁶ *Nations v. Lovejoy*, 80 Miss. 401, 31 So. 811.

¹⁷ *In re Petition of Remsen*, 59 Barb. 317; *In re Petition of Eager*, 58 id. 557; *In re Petition of Treacy*, 59 id. 525.

latter was held not to apply.¹⁸ The following were held not to apply to pending cases: An act changing the rule as to costs to be paid by the complainant in contested election cases;¹⁹ an act giving the plaintiff's attorney a lien on the cause of action and the proceeds thereof;²⁰ an act that interest paid in excess of six per cent. may be recovered back, however long ago paid;²¹ an act providing that before suit is commenced to enforce a judgment lien, execution must have been returned unsatisfied.²²

§ 675 (483). *Curative statutes.*—The legislature has power to pass healing acts which do not impair the obligation of contracts nor interfere with vested rights.²³ They are remedial by curing defects, and adding to the means of enforcing existing obligations.²⁴ The rule in regard to curative statutes is that if the thing omitted or failed to be done, and which constitutes the defect sought to be removed or made harmless, is something which the legislature might have dispensed with by a previous statute, it may do so by a subsequent one. If the irregularity consists in doing some act, or doing it in the mode which the legislature might have made immaterial by a prior law, it may do so by a subsequent one. These rules are supported by numerous cases.²⁵ On this principle the legislature may vali-

¹⁸ *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572.

¹⁹ *Thomas' Election*, 198 Pa. St. 546, 48 Atl. 489.

²⁰ *Potter v. Ajax Min. Co.*, 19 Utah, 421, 57 Pac. 270.

²¹ *Ashland Savings Bank v. Bailey*, 66 N. H. 334, 21 Atl. 221.

²² *Burns v. Hays*, 44 W. Va. 503, 30 S. E. 101.

²³ *Green v. Abraham*, 43 Ark. 420.

²⁴ *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. Ed. 458.

²⁵ *Green v. Abraham*, 43 Ark. 420; *State v. Squires*, 26 Iowa, 340; *Wat-*

son v. Mercer, 8 Pet. 88, 8 L. Ed. 876; *Chesnut v. Shane*, 16 Ohio, 599;

Newman v. Samuels, 17 Iowa, 518; *Journey v. Gibson*, 56 Pa. St. 57;

Shonk v. Brown, 61 id. 327; *Dulany v. Tilghman*, 6 G. & J. 461; *Dentzel*

v. Waldie, 30 Cal. 138; *Johnson v. Richardson*, 44 Ark. 365; *Barnet v.*

Barnet, 15 S. & R. 72, 16 Am. Dec. 516; *Tate v. Stooltzfoos*, 16 S. & R.

35, 16 Am. Dec. 546; *Jackson v. Gilchrist*, 15 John. 89; *Raverty v.*

Fridge, 3 McLean, 230. Fed. Cas. No. 11,586; *Goshorn v. Purcell*, 11 Ohio

St. 641; *Davis v. State Bank*, 7 Ind. 316; *Thornton v. McGrath*, 1 Duv.

date contracts made *ultra vires* by municipal corporations,²⁶ or which are invalid by reason of informality.²⁷ It may thus ratify a contract of a municipal corporation for a pub-

349; *State v. Town of Union*, 33 N. J. L. 350; *Jacksonville v. Basnett*, 20 Fla. 525; *Re Van Antwerp*, 1 T. & C. 423, 56 N. Y. 261; *Bass v. Mayor*, etc., 30 Ga. 845; *Honey v. Clark*, 37 Tex. 686; *Montgomery v. Hobson*, Meigs, 437; *Constantine v. Van Winkle*, 6 Hill, 177; *Van Winkle v. Constantine*, 10 N. Y. 422; *Hardenburgh v. Lakin*, 47 N. Y. 109; *Davis v. Van Arsdale*, 59 Miss. 367; *Jackson v. Dillon*, 2 Overt. 261; *Mathewson v. Spencer*, 3 Sneed, 513; *O'Brian v. County Commissioners*, 51 Md. 15; *Washington v. Washington*, 69 Ala. 281; *Vaughan v. Swayzie*, 56 Miss. 704; *People v. Supervisors*, 20 Mich. 95; *People v. Mitchell*, 35 N. Y. 551; *People v. McDonald*, 69 id. 362; *Duanesburgh v. Jenkins*, 57 N. Y. 191; *Morris v. State*, 62 Tex. 723; *Steers v. Kinsey*, 68 Ark. 360, 58 S. W. 1050; *Bacon v. Savannah*, 105 Ga. 62, 31 S. E. 127; *Park v. Modern Woodmen*, 181 Ill. 214, 54 N. E. 932; *Steger v. Traveling Men's Bldg. Ass'n*, 208 Ill. 236; *Doyle v. Baughman*, 24 Ill. App. 614; *Richman v. Muscatine County*, 77 Iowa, 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445; *Clinton v. Walliker*, 98 Iowa, 655, 68 N. W. 431; *Windsor v. Des Moines*, 110 Iowa, 175, 81 N. W. 476, 80 Am. St. Rep. 280; *Fair v. Buss*, 117 Iowa, 164, 90 N. W. 527; *Marion County v. L. & N. R. Co.*, 91 Ky. 388, 15 S. W. 1061; *Smith v. Buffalo*, 159 N. Y. 427, 54 N. E. 62; *Kent v. Warner*, 47 Hun, 474; *People v. Turner*, 49 Hun, 466, 2 N. Y. S. 253; *Matter of Flower*, 55

Hun, 158, 7 N. Y. S. 866; *Shuttuck v. Smith*, 6 N. D. 56, 69 N. W. 5; *Nottage v. Portland*, 35 Ore. 539, 58 Pac. 883, 76 Am. St. Rep. 513; *Devers v. York City*, 150 Pa. St. 208, 24 Atl. 668; *Coolidge v. Pierce County*, 28 Wash. 95, 68 Pac. 391; *Erskine v. Steele County*, 87 Fed. 630; *Steele County v. Erskine*, 98 Fed. 215, 39 C. C. A. 173.

In *Williamstown Graded Free School District v. Webb*, 89 Ky. 264, 12 S. W. 298, the court says: "The rule is that if the thing wanted or omitted might have been dispensed with by the legislature at the outset, then it may do so by a statute enacted subsequent to the proceeding which is assailed on account of the omission. If the irregularity consists in doing some act, or in the manner of doing some act, which the legislature might, by the prior law, have treated as immaterial, then it may make it immaterial by a subsequent law."

²⁶ *O'Brian v. County Commissioners*, 51 Md. 15; *Bass v. Mayor*, etc., 30 Ga. 845; *Single v. Supervisors*, 38 Wis. 363; *Brown v. Mayor*, etc., 63 N. Y. 239; *Windsor v. Des Moines*, 110 Iowa, 175, 81 N. W. 476, 80 Am. St. Rep. 280; *Erskine v. Nelson County*, 4 N. D. 66, 58 N. W. 348, 27 L. R. A. 696; *Erskine v. Steele County*, 87 Fed. 630; *Steele County v. Erskine*, 98 Fed. 215, 39 C. C. A. 173.

²⁷ *Gordon v. San Diego*, 101 Cal. 522, 36 Pac. 18; *Windsor v. Des Moines*, 101 Iowa, 343, 70 N. W. 214.

lic purpose. Municipal corporations are agencies of the state through which the sovereign power acts in matters of social concern. It may confer upon them, subject to such constitutional restraints as exist, power to enter into contracts, and may annex such limitations and conditions to its exercise as, in its discretion, it deems proper for the protection of the public interests. The right to limit involves the power to dispense with limitations; and in such case, as the legislature could have authorized a contract without previous advertisement, or competitive bidding, it may affirm a contract made, although made originally without authority of law.²⁸ The legislature may establish contracts and deeds defectively executed, acknowledged or recorded,²⁹ including those of married women;³⁰ marriages may be validated and offspring legitimated;³¹ also defective sales of property under powers, judgments or decrees,³² defective assessments

²⁸ *Id.*; *In re Van Antwerp*, 56 N. Y. 261.

²⁹ *Jackson v. Dillon*, 2 Overt. 261; *Montgomery v. Hobson*, Meigs, 437; *Jackson v. Gilchrist*, 15 John. 89; *Hardenburgh v. Lakin*, 47 N. Y. 109; *Atwell v. Grant*, 11 Md. 101; *Cutler v. Supervisors*, 56 Miss. 115; *Hughes v. Cannon*, 2 Humph. 589; *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648; *Bryan v. Bryan*, 62 Ark. 79, 34 S. W. 260; *British & Am. Mort. Co. v. Winchell*, 62 Ark. 160, 34 S. W. 891; *Hill v. Yarborough*, 62 Ark. 320, 35 S. W. 433; *Shattuck v. Lyons*, 62 Ark. 338, 35 S. W. 436; *Williamson v. Lazarus*, 66 Ark. 226, 49 S. W. 974, 74 Am. St. Rep. 91; *Steers v. Kinsey*, 68 Ark. 360, 58 S. W. 1050; *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446; *Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691, 36 L. R. A. 226; *Butler v. U. S. B. & L. Ass'n*, 97

Tenn. 679, 37 S. W. 385; *Swope v. Jordan*, 107 Tenn. 166, 64 S. W. 52; *Williams v. Paine*, 169 U. S. 55, 18 S. C. Rep. 279, 42 L. Ed. 658.

³⁰ *Constantine v. Van Winkle*, 6 Hill, 177; *Van Winkle v. Constantine*, 10 N. Y. 422; *Johnson v. Richardson*, 44 Ark. 365; *Watson v. Mercer*, 8 Pet. 88, 8 L. Ed. 876; *Wistar v. Foster*, 46 Minn. 481, 49 N. W. 247, 24 Am. St. Rep. 241. But see *Alabama Ins. Co. v. Boykin*, 38 Ala. 510.

³¹ *Honey v. Clark*, 37 Tex. 686; *Washington v. Washington*, 69 Ala. 281.

³² *Davis v. State Bank*, 7 Ind. 316; *Thornton v. McGrath*, 1 Duv. 349; *Power v. Penny*, 59 Miss. 5; *Madigan v. Workingmen's Permanent B. & L. Ass'n*, 73 Md. 317, 20 Atl. 1069; *Kiskaddon v. Dodds*, 21 Pa. Supr. Ct. 351.

of taxes,³³ defective proceedings for local improvements,³⁴ and municipal ordinances irregularly adopted.³⁵ An act validating ordinances passed by cities while organized and operating under a void statute was held valid and effectual.³⁶ An amendment to a city charter which provided that all ordinances theretofore adopted should remain in force was held not to make valid ordinances which the city had no power to pass.³⁷ The legislature may authorize the cost of a local improvement made under a void ordinance to be reassessed, or otherwise collected.³⁸

The important question on such statutes is, would the acts

³³ *Davis v. Van Arsdale*, 59 Miss. 367; *People v. McDonald*, 69 N. Y. 262; *Jacksonville v. Basnett*, 20 Fla. 525; *Cochran v. Baker*, 60 Miss. 282; *Francklyn v. Long Island City*, 32 Hun, 451; *Vaughan v. Swayzie*, 56 Miss. 704; *Chicago, R. I. & P. Ry. Co. v. Avoca*, 99 Iowa, 556, 68 N. W. 881; *Terrel v. Wheeler*, 123 N. Y. 76, 25 N. E. 329; *Van Deventer v. Long Island City*, 139 N. Y. 133, 34 N. E. 774; *People v. Turner*, 49 Hun, 466, 2 N. Y. S. 253; *Matter of Lamb*, 51 Hun, 633, 4 N. Y. S. 858; *Matter of Flower*, 55 Hun, 158, 7 N. Y. S. 866; *Matter of Delaware & H. Canal Co.*, 60 Hun, 204, 14 N. Y. S. 585; *Hatzung v. Syracuse*, 92 Hun, 203, 36 N. Y. S. 521; *Shuttuck v. Smith*, 6 N. D. 56, 69 N. W. 5; *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241; *Groat v. Johnson*, 73 Vt. 263, 50 Atl. 1059; *Coolidge v. Pierce County*, 28 Wash. 95, 68 Pac. 391. It is held that a tax assessed upon land against the wrong person cannot be validated. *Hagner v. Hall*, 10 App. Div. 581, 42 N. Y. S. 63. The case contains a lengthy discussion of the limitations upon the power to pass curative statutes.

In Kentucky it is held that an irregular or defective assessment for taxation may be validated, but not a void assessment. *Slaughter v. Louisville*, 89 Ky. 112, 8 S. W. 917.

³⁴ *Doyle v. Baughman*, 24 Ill. App. 614; *Richman v. Muscatine County*, 77 Iowa, 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445; *Clinton v. Walliker*, 98 Iowa, 655, 68 N. W. 431; *Loomis v. Little Falls*, 66 App. Div. 299, 72 N. Y. S. 774.

³⁵ *State v. Town of Union*, 33 N. J. L. 350; *Walpole v. Elliott*, 18 Ind. 258, 81 Am. Dec. 358; *Schenley v. Commonwealth*, 36 Pa. St. 29; *Morris v. State*, 62 Tex. 728.

³⁶ *Devers v. York City*, 150 Pa. St. 208, 24 Atl. 668; *Chester v. Pennell*, 169 Pa. St. 300, 32 Atl. 408.

³⁷ *Red Wing v. Chicago, etc. Ry. Co.*, 72 Minn. 240, 75 N. W. 223, 71 Am. St. Rep. 482.

³⁸ *Gill v. Patton*, 118 Iowa, 88, 91 N. W. 904; *Nottage v. Portland*, 35 Ore. 539, 58 Pac. 893, 76 Am. St. Rep. 513; *State v. Henry*, 28 Wash. 88, 68 Pac. 368; *Schintgen v. La Crosse*, 117 Wis. 158.

done be effectual for the purpose intended, if a law, made prior to those acts, had directed them as they were done; whether the statute alone made them essential for that purpose. Rights resting upon such curable defects alone cannot be deemed meritorious and are not entitled to the protection accorded to vested rights. Where they are relied on as an excuse for repudiating contracts, executory or executed, they are not within the protection of the constitution.³⁹

§ 676. The legislature cannot validate what it could not have previously authorized.⁴⁰ Acts which are jurisdictional and could not be antecedently dispensed with by statute cannot be made immaterial by subsequent legislation.⁴¹ If such jurisdictional facts are wanting the proceeding is a nullity and cannot be cured by any subsequent legislation, for no prior legislation could make it effectual. Thus, for example, in *Lane v. Nelson*:⁴² "It is settled by a current of authority that the legislature cannot by an arbitrary edict take the property of one man and give it to another; and that when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the legislature to infuse life into that which is dead."⁴³ The legislature "has no power

³⁹ *Baughner v. Nelson*, 9 Gill, 299, 52 Am. Dec. 694; *O'Brian v. County Commissioners*, 51 Md. 15; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *People v. Mitchell*, 35 N. Y. 551; *Johnson v. Richardson*, 44 Ark. 365; *Green v. Abraham*, 43 id. 420.

⁴⁰ *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081; *State v. Harper*, 30 S. C. 586, 9 S. E. 664; *State v. Neely*, 30 S. C. 587, 9 S. E. 664; *Matter of Trustees of Union College*, 129 N. Y. 308, 29 N. E. 460; *Ellis v. Northern Pac. R. R. Co.*, 77 Wis. 114, 45 N. W. 811.

⁴¹ *State v. Town of Union*, 33 N. J. L. 350.

⁴² 79 Pa. St. 407.

⁴³ Citing *Newman v. Heist*, 5 W. & S. 171, 40 Am. Dec. 493; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 56; *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570; *Menges v. Dentler*, 33 Pa. St. 495, 75 Am. Dec. 46; *Bagg's Appeal*, 43 Pa. St. 512, 82 Am. Dec. 583; *Schafer v. Eneu*, 54 Pa. St. 304; *Shonk v. Brown*, 61 id. 320; *Richards v. Rote*, 68 id. 248; *Hegarty's Appeal*, 75 id. 503.

to make a decree or judgment rendered without jurisdiction a valid and binding decree or judgment.”⁴⁴ Contracts may not be validated so as to affect the intervening rights of third parties.⁴⁵ In speaking of the power of the legislature to validate contracts for the sale or conveyance of real estate, the supreme court of North Carolina says: “It would seem therefore more accurate to declare that the power to enact remedial statutes giving effect to contracts for the sale and conveyance of land extends only to those cases where the grantee or other person deriving benefit from their enforcement had, previous to the passage of the law, an equitable right, and not to cases where the policy of the law or the express provision of a statute had prevented the transmission of any interest whatever by the instrument or agreement relied on.”⁴⁶

A law of the Indian Territory required chattel mortgages to be recorded in the county where the mortgagor resided, but made no provision for recording mortgages by non-residents. A mortgage by a resident of Texas upon property in the territory was recorded in the county of Texas where the mortgagor resided and also in the judicial district of the territory where the property was situated. After an attachment had been levied upon the mortgaged property, and after judgment by default against the mortgagor sustaining the attachment as to him, congress passed an act providing that such mortgages could be recorded in the judicial district where the property was situated, and validated all mortgages previously so recorded. When the property was attached the mortgagees replevied the property and filed an interpleader in the attachment suit claiming a first lien on the property, and this issue was pending

⁴⁴ *Willis v. Hodson*, 79 Md. 327, 578, 87 N. W. 655; *Finders v. Bodle*, 39 Atl. 604, 58 Neb. 57, 78 N. W. 480; *Andrews*

⁴⁵ *Shattuck v. Byford*, 62 Ark. 431, 35 S. W. 1107; *Steger v. Traveling Men's Bldg. Ass'n*, 208 Ill. 236; *v. Beane*, 15 R. I. 451, 8 Atl. 540.

⁴⁶ *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379.
Blackman v. Henderson, 116 Iowa,

and undetermined when the act was passed. It was held that the levy of the attachment gave no vested right which congress could not displace by the curative act, and that the mortgagees had the prior lien by virtue of the act.⁴⁷ Where an act was passed validating voluntary assignments, which were void by reason of the failure of the court commissioner to indorse his approval on the assignee's bond, it was held that the curative act applied to pending proceedings,⁴⁸ but that it did not affect the rights of a creditor who had obtained judgment against the property before the act was passed, and that such judgment gave a vested right which the legislature could not impair.⁴⁹

§ 677. An act authorized cities of the first class to license railroad companies to use the streets and confirmed contracts theretofore made granting such use. So far as the act related to past contracts it was held void as special legis-

⁴⁷ *McFadden v. Evans-Snider-Buel Co.*, 185 U. S. 505, 22 S. C. Rep. 758, 46 L. Ed. 1012, affirming *Evans-Snider-Buel Co. v. McFadden*, 105 Fed. 293, 44 C. C. A. 494, and overruling *McFadden v. Blocker*, 2 Ind. Ter. 260, 48 S. W. 1043. A statute curing defective acknowledgments and made to apply to past conveyances was held valid as against one who before the act had levied an attachment on property which had been conveyed by a mortgage defectively acknowledged. The levy of the attachment was held to give no vested right. *Steers v. Kinsey*, 68 Ark. 360, 58 S. W. 1050. The court says: "Now a vested right must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, to the present or future enjoyment of property, in some

way or another. *Black*, Const. Law, 430; *Sutherland*, Stat. Const., § 164. But parties have no vested rights in remedies or matters of procedure, and we see nothing in these attachment proceedings that constituted a vested right on the part of the plaintiffs therein to the property attached. The attachments were levied upon the land after the mortgage under which the *Arkansas City Improvement Company* holds had been executed and recorded, and we think it was within the power of the legislature to give to such mortgage the effect intended by the parties thereto, by curing the formal defect in the acknowledgment."

⁴⁸ *Johnson v. Hill*, 90 Wis. 19, 62 N. W. 930, 46 Am. St. Rep. 815; *Freiberg v. Singer*, 90 Wis. 608, 63 N. W. 754.

⁴⁹ *Charles Baumbach Co. v. Singer*, 86 Wis. 329, 56 N. W. 873.

lation, and also on the ground that the legislature cannot confirm an act done without power, though it may confirm an irregular execution of a power.⁵⁰ The acts and contracts of foreign corporations made before complying with the conditions imposed by state laws may be validated and the contracts enforced.⁵¹ It is held that the legislature may validate a tax sale made by the wrong officer,⁵² but that it cannot validate a sale so defective as to convey no title, so as to cut the owner off from payment or redemption.⁵³ An act validating all assessments of benefits or damages for the grading or improvement of any street was held not to embrace assessments made by a body having no authority whatever to make them, as where an assessment was made by a board of aldermen and board of councilmen, acting jointly, when they should have acted separately. The act was held to presuppose jurisdiction to make the assessment and to only cure irregularities in exercising a power lawfully possessed.⁵⁴ A tax levied without authority may be validated.⁵⁵ So of proceedings to condemn property for public use, which are void for irregularity or failure to comply

⁵⁰ *Pennsylvania R. R. Co. v. Burlington*, 58 N. J. Eq. 547, 43 Atl. 700, affirming *Burlington v. Pennsylvania R. R. Co.*, 56 N. J. Eq. 259, 38 Atl. 849.

⁵¹ *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446; *Butler v. U. S. B. & L. Ass'n*, 97 Tenn. 679, 37 S. W. 385; *Swope v. Jordon*, 107 Tenn. 168, 64 S. W. 52.

⁵² *Hoffman v. Pack*, 123 Mich. 74, 81 N. W. 934.

⁵³ *Cromwell v. McLean*, 123 N. Y. 474, 25 N. E. 932; *Ne-ha-sa-ne Park Association v. Lloyd*, 7 App. Div. 359, 40 N. Y. S. 58. And where a tax sale was invalid because the notice given did not fully comply with the statute, it was held that the legislature could not validate

the sale. *McCord v. Sullivan*, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561. The court says: "It is true that the legislature may cure irregularities and defects in tax proceedings, but that irregularities and defects which go to the jurisdiction of the officers to act, and affect the substantial rights of the property owner, cannot be cured by subsequent legislation is thoroughly settled by authorities." p. 348.

⁵⁴ *Harris v. Ansonia*, 73 Conn. 359, 47 Atl. 672.

⁵⁵ *Marion County v. L. & N. R. R. Co.*, 91 Ky. 388, 15 S. W. 1061; *Louisville & N. R. R. Co. v. Bullitt County*, 92 Ky. 280, 17 S. W. 632.

with statutory requirements.⁵⁶ The legislature may validate a defectively organized corporation, whether public or private,⁵⁷ and may cure defects or irregularities in election proceedings.⁵⁸ A legally organized municipal corporation may be authorized to pay the debts of an attempted but illegal corporation embracing the same territory.⁵⁹

Curative acts apply to pending proceedings.⁶⁰ "It is truly said that the bringing of suit vests in a party no right to a particular decision; and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered."⁶¹ It is no objection to a curative act that it validates what has previously been declared invalid in a judicial proceeding.⁶² The judgment may furnish

⁵⁶ *Clinton v. Walliker*, 98 Iowa, 655, 68 N. W. 431; *Fair v. Buss*, 117 Iowa, 164, 90 N. W. 527; *Water Commissioners v. Dwight*, 101 N. Y. 9; *Spaulding v. Nourse*, 143 Mass. 490; *O'Brien v. Commissioners of Baltimore County*, 51 Md. 15; *Mattingly v. District of Columbia*, 97 U. S. 687; 1 *Lewis' Em. Dom.*, § 261. *Contra*, *Holliday v. Atlanta*, 96 Ga. 377, 23 S. E. 406.

⁵⁷ *State v. Webb*, 110 Ala. 214, 20 So. 462; *People v. Levee District*, 131 Cal. 30, 63 Pac. 676; *Tenn. Cent. R. R. Co. v. Campbell*, 109 Tenn. 655, 73 S. W. 112; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 28 S. W. 668, 45 Am. St. Rep. 700, 26 L. R. A. 509; *State v. McGovern*, 100 Wis. 666, 76 N. W. 593; *Winneconne v. Winneconne*, 111 Wis. 13, 86 N. W. 590. In the latter case an act for the incorporation of villages was held invalid as a delegation of legislative power. Thereupon the legislature passed an act declaring that all villages organized under the act should be deemed to have been duly incorporated.

It was held that the act was effectual only to make the attempted incorporation valid from the date of the act but not *ab initio*.

⁵⁸ *Witter v. Board of Supervisors*, 112 Iowa, 380, 83 N. W. 1041; *Fitzpatrick v. Board of Trustees*, 87 Ky. 132, 7 S. W. 896; *Eastman v. McCartin*, 70 N. H. 23, 45 Atl. 1081.

⁵⁹ *State v. Winter*, 15 Wash. 407, 46 Pac. 644.

⁶⁰ *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648; *Windsor v. Des Moines*, 110 Iowa, 175, 81 N. W. 476, 80 Am. St. Rep. 280; *Madigan v. Workingmen's Permanent B. & L. Ass'n*, 73 Md. 317, 20 Atl. 1069.

⁶¹ *Madigan v. B. & L. Ass'n*, 73 Md. 317, 321, 20 Atl. 1069.

⁶² *Schneck v. Jeffersonville*, 152 Ind. 204, 52 N. E. 212; *Richman v. Muscatine County*, 77 Iowa, 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445; *Wrought Iron Bridge Co. v. Attica*, 119 N. Y. 204, 23 N. E. 542; *Windsor v. Des Moines*, 110 Iowa, 175, 81 N. W. 476, 80 Am. St. Rep. 280; *Terrel v. Wheeler*, 123 N. Y. 76, 25 N. E. 329; *Nottage v.*

the occasion for the act. Of course the legislature cannot annul or set aside the judgment of a court, but it may remove a defect on which the judgment proceeded. The refunding of certain municipal bonds was enjoined on the ground that the bonds were void. Afterwards the legislature legalized the bonds and authorized them to be refunded. The act was held valid.⁶³ Plaintiff sued on a county warrant and was defeated because the county had no authority to contract for the services for which it was given. Afterwards the legislature passed an act giving such authority and validating past contracts. It was held that the plaintiff could then maintain an action on the contract itself.⁶⁴

Portland, 35 Ore. 539, 58 Pac. 883,
76 Am. St. Rep. 513; Erskine v.
Steele County, 87 Fed. 630; Steele
County v. Erskine, 98 Fed. 215, 39
C. C. A. 173.

⁶³ *Schneck v. Jeffersonville*, 152
Ind. 204, 52 N. E. 212.

⁶⁴ *Steele County v. Erskine*, 98
Fed. 215, 39 C. C. A. 173, affirming
S. C. *sub nom.* *Erskine v. Steele*
County, 87 Fed. 630.

CHAPTER XVIII.

CONSTRUCTION OF PARTICULAR STATUTES.

§ 678. **Scope and explanation of the chapter.**—It has seemed to the writer of the second edition of this book that there was certain material which could be most advantageously placed under the heading which forms the title to this chapter. The material for the chapter is derived mostly from the decisions which have been rendered since the first edition was published, and this will account for the few references to decisions of earlier date. Under the arrangement of the first edition this material would have been distributed through chapters XIV and XV; but, as courts differ in the application of the rules of strict construction and liberal construction, the same act will be put under the head of *strict construction* by one court and under the head of *liberal construction* by another. Mechanics' lien statutes are an illustration. Instead of citing some decisions on this class of statutes under the head of *strict construction* and some under the head of *liberal construction*, it has seemed better to put them all under one head. And the same is true of other classes of statutes.

§ 679 (434). **Remedial statutes in general.**—Remedial statutes have been defined in very general terms as those which, in brief, are made to correct defects in the existing law—for amendment of the law;¹ those which have for their object the redress of some existing grievance, or the introduction of some regulation conducive to the public good. They may be either affirmative or negative, as they command or prohibit anything in particular to be done or omitted.² A variety of remedial statutes have been cited,

¹ *Bearpark v. Hutchinson*, 7 Bing. at p. 186.

² *Van Hook v. Whitlock*, 2 Edw. Ch. 304, 310; *Fairchild v. Gwynne*, 16 Abb. Pr. 31.

with the decisions thereon, in a former chapter.³ Guided by the general principles which underlie and justify liberal construction, the courts must continually add to the list; for, in the construction of the fluctuating luxuriance of legislation by the numerous legislative bodies in this country, there will be frequent occasions to apply these principles to new cases to cure defects and abridge superfluities which, in the phrase of Blackstone, "arise either from the general imperfection of all human laws, from the change of time and circumstances, from mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other causes whatever."⁴

A remedial statute should be construed to carry out the purpose intended.⁵ An act that any person or corporation having a claim against the state might bring an action against the state in a certain court was held to be remedial and to be liberally construed, and the word "claim" was held to embrace, not only money demands, but any cause of action.⁶ The following acts were held to be remedial and to be liberally construed: An act to validate slave marriages and legitimate the issue thereof;⁷ an act to secure the proceeds of benefit certificates to the members of deceased's family;⁸ an act giving the taxpayers of a school district the right to declare against the employment of any person as a school teacher;⁹ an act relating to the placing of minors in institutions for their care and guardianship;¹⁰ an act providing for opening the allowance of claims against an estate and the retrial of the same;¹¹ an act for the formation of

³ Ch. XVI.

⁴ 1 Cooley's Black. Com. 86, 87.

⁵ Beley v. Naphtaly, 169 U. S. 353, 18 S. C. Rep. 354, 42 L. Ed. 775; O'Brien v. Moss, 131 Ind. 99, 30 N. E. 894; In re Sanders, 53 Kan. 191, 36 Pac. 348, 23 L. R. A. 603.

⁶ Northwestern, etc. Bank v. State, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33.

⁷ Jennings v. Webb, 8 App. Cas. (D. C.) 43.

⁸ Brown v. Balfour, 46 Minn. 68, 48 N. W. 604.

⁹ O'Brien v. Moss, 131 Ind. 99, 30 N. E. 894.

¹⁰ In re Sanders, 53 Kan. 191, 36 Pac. 348, 23 L. R. A. 603.

¹¹ Martin v. LeMaster, 63 Mo. App. 342.

limited partnerships;¹² and an act to prevent the spread of contagious and infectious diseases among swine.¹³ An act providing for execution of powers in a will, by the successor of an executor, for sale of lands for purposes of the will and administration, is remedial and entitled to a liberal construction.¹⁴ The statute which renders void bequests to witnesses was intended to prevent wills from becoming nullities by reason of any interest in witnesses to them, created entirely by the wills themselves. A wife of a legatee is within the mischief on account of the unity of husband and wife, in legal contemplation, and statutes concerning wills being subject to liberal construction, a bequest in a will so witnessed is void and the will properly attested.¹⁵

§ 680 (441). Statutes which confer or extend the elective franchise,¹⁶ which take away penalties,¹⁷ which give compensation to those whose property is taken compulsorily,¹⁸ statutes which are in favor of those on whom taxes are assessed or burdens laid,¹⁹ or in favor of those who are subjected to prejudice by exercise of a special privilege granted by law,²⁰ are remedial and to be liberally construed. Where the intent is plain to confer a privilege upon those whose rights are to be affected by a statutory proceeding in derogation of the rights of private property, and the language is doubtful as to the extent of the privilege, it is the duty

¹² *White v. Eiseman*, 134 N. Y. 101, 31 N. E. 276. The court says: "While the courts were at first inclined to a strict construction against those thus seeking exemption from the common-law liability of partners, the tendency in this state is now toward a liberal construction, so as to accomplish the wise purpose of the act by uniting capital and labor in business enterprises, without excessive hazard to the former."

¹³ *Conrad v. Crowdsen*, 75 Ill. App. 614.

¹⁴ *Drayton v. Grimke*, 1 Bailey's Eq. 392.

¹⁵ *Winslow v. Kimball*, 25 Me. 493.

¹⁶ *Thompson v. Ward*, L. R. 6 C. P. at p. 353.

¹⁷ *Evans v. Pratt*, 3 M. & G. at p. 767.

¹⁸ *Reg. v. St. Luke's*, L. R. 7 Q. B. at p. 153; *Mayor, etc. v. Lord*, 17 Wend. 285; affirmed, 18 id. 126.

¹⁹ *White Co. v. Key*, 30 Ark. 603; *Walker v. Chicago*, 56 Ill. 277.

²⁰ *Boston, etc. Co. v. Gardner*, 2 Pick. 33, 37; *Finch v. Birmingham Canal Co.*, 5 B. & C. 820.

of the courts to give it the largest construction in favor of the privilege which the language employed will fairly permit.²¹ This was declared of the time or period during which assessors were required to continue their sessions to revise assessments. The provision was that they should continue in session "each and every secular day for the period of twenty consecutive days." The court, regarding the revision as a privilege to the persons assessed, excluded Sundays.²² Statutes providing a mode of reimbursement for outlays made pursuant to law for the benefit of another are favorably construed to make such indemnity effectual. Thus, a compulsory process was allowed a municipal authority to collect the cost of work on a sidewalk, the owner having failed to comply with a direction to do the work himself.²³ "No penalty," say the court, "is imposed on the owner, but a remedial process is provided for the purpose of securing simple indemnity for expenditures lawfully made for his benefit. The statute, therefore, is to be construed liberally, with a view to the beneficial ends proposed."²⁴

§ 681 (442). Statutory provisions for the protection of officers employed in the administration of justice in the discharge of their duty are remedial, and are to be extended by construction, as far as their words will permit, to embrace all cases within their purview.²⁵ An act was intended to grant a bounty to pioneer settlers on an exposed frontier, but was ambiguous as to the beneficiaries; it was resolved in favor of including all those equally within the reason of the bounty.²⁶ Section 1594 of the Revised Statutes of the United States was derived from an act to promote the efficiency of the navy, and being intended to enable the president, with the advice and consent of the senate, to relieve a deserving officer from the consequences of the findings of

²¹ Walker v. Chicago, 56 Ill. 277.

²² Id.

²³ Hudler v. Golden, 36 N. Y. 446.

²⁴ Hudler v. Golden, 36 N. Y. 446.

²⁵ Cook v. Clark, 10 Bing. at p. 21; Morris v. Van Voast, 19 Wend. 283.

²⁶ Ross v. Barland, 1 Pet. 655, 7

L. Ed. 302. See Roane v. Innis,

Wythe (Va.), 62,

retiring boards, it should, it was held, be liberally construed in favor of justice.²⁷ An act legitimating bastards has been held remedial and to be liberally construed.²⁸ In New York, a statute "for the protection of married women" has been held remedial and to be liberally construed.²⁹ Patents for inventions should be liberally construed.³⁰ The provisions of the act of congress passed in 1851 to limit the liability of ship-owners, although they change the common law, are not penal nor in derogation of natural right so as to require a strict construction. They were enacted to remedy the rigor of the common law, and should be construed, if not liberally, at least fairly, to carry out the policy they were enacted to promote; and the term "any goods, wares or merchandise whatsoever" was held to include baggage.³¹ The statutes requiring railroad companies to fence their roads are made *pro bono publico*, and are to be construed liberally to attain the end for which they are enacted.³² But such statutes are not to be so literally con-

²⁷ United States v. Burchard, 125 U. S. 176, 8 S. C. Rep. 832, 31 L. Ed. 662.

²⁸ Beall v. Beall, 8 Ga. 210.

²⁹ Billings v. Baker, 28 Barb. 343; Goss v. Cahill, 42 id. 310.

³⁰ Blanchard v. Sprague, 3 Sumn. 539, Fed. Cas. No. 1517. "Formerly, in England," said Judge Story, "courts of law were disposed to indulge in very close and strict construction of the specifications accompanying patents, and expressing the nature and extent of the invention. This construction seems to have been adopted upon the notion that patent-rights were in the nature of monopolies, and, therefore, were to be narrowly watched, and construed with a rigid adherence to their terms, as being in derogation of the general rights of the community. At pres-

ent a far more liberal and expanded view of the subject is taken. Patents for inventions are now treated as a just reward to ingenious men, and as highly beneficial to the public, not only by holding out suitable encouragements to genius and talents and enterprise, but as ultimately securing to the whole community great advantages from the free communication of secrets, and processes, and machinery, which may be most important to all the great interests of society, to agriculture, to commerce and to manufactures, as well as to the cause of science and art."

³¹ Chamberlain v. Western Transp. Co., 44 N. Y. 305.

³² Tallman v. Syracuse, etc. R. R. Co., 4 Keyes, 128.

strued as to render a railroad corporation liable for injuries occasioned upon its road, at a time when the fence is temporarily out of repair, without fault or negligence in any manner imputable to the company.³³

§ 682 (443). In construing a remedial statute which has for its end the promotion of important and beneficial public objects, a large construction is to be given when it can be done without doing actual violence to its terms; and this construction will be given in favor of a right of appeal by a party aggrieved, to procure a review of the acts of officers who by erroneous action have improperly defeated a public improvement.³⁴ And a power granted to a municipal corporation to enlarge any of the slips in the city is a continuing power; and, being granted to subserve the public convenience, and connected with the necessary regulation and regular supply of a rapidly growing city, should be liberally construed in favor of the public interest. It was held to authorize the enlargement by extending the slips further into the river as well as widening them.³⁵ An act empowering a company to contract for purposes of public advantage ought not to receive a narrow construction.³⁶ So a law respecting public rights and interests, generally, should be liberally construed, so as to make it effectual against the evil it was intended to abate, when this can be done without depriving any individual of his just rights.³⁷ Authority was given to designate a state paper, and to enter into a contract with the publisher for publication of legal and other notices required by law to be published therein. The statute conferring this power was held remedial and the power a continuing one; that it was not exhausted by a single exercise.³⁸

³³ *Murray v. New York Cent. R. Co.*, 4 Keyes, 274.

³⁴ *Wolcott v. Pond*, 19 Conn. 527.

³⁵ *Marshall v. Vultee*, 1 E. D. Smith, 294.

³⁶ *Dover Gas L. Co. v. Dover*, 7 De G. M. & G. 545.

³⁷ *Plowman*, Ex parte, 53 Ala. 440.

³⁸ *Weed v. Tucker*, 19 N. Y. 422. Denio, J., said: "When we are seeking to ascertain the intention of the law-maker, we are to assume that the statute was designed to

§ 683 (444). Statutes for the prevention of fraud are remedial and liberally construed. Such is an act to prevent an insolvent debtor from making preferences among his creditors.³⁹ "These statutes," said Lord Mansfield, "cannot receive too liberal a construction, or be too much extended in suppression of fraud."⁴⁰ It was held that an English statute imposing a penalty on any officer of a limited company who signs on its behalf a bill of exchange upon which its name does not appear, and also rendering him personally liable to the holder of the bill, was partly remedial and partly penal.⁴¹ The same construction was placed on an-

be an adequate and final arrangement for the public exigency which called for its enactment. That exigency in this case was a provision which should secure the continued publication of these legal notices, and we are to intend that the statutory provisions were framed with a view to accomplish that result; and not that a temporary measure was in the consideration of the legislature, which, when it should fail from its inherent defects, could be supplied by further legislation. . . . We disclaim any power to supply a defect in it if one exists. If the language, reasonably construed, fails to carry out what we conceive to have been the general intention of the legislature, it is a *casus omissus*, which is irremediable by the courts. But when the question, as in this case, is what the language employed really means, it is important to ascertain from all legitimate sources what the emergency or public necessity was which led to the enactment, and we are not to pronounce the measure inadequate without a faithful endeavor to accommodate the language to

the obvious intention." In another part of the opinion the learned judge further said: "It is a part of the legal arrangements for carrying on the government and providing for the administration of justice among the citizens of the state and is remedial in its character. In such cases the rule is that, if the words of a statute are not explicit, the sense is to be gathered from the occasion and necessity of the law, the defect in the former law, and the designed remedy. It is to be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. It is to be construed liberally, in contradistinction from a merely verbal construction — largely and beneficially — so as to suppress the mischief and advance the remedy."

³⁹ *Terrill v. Jennings*, 1 Met. (Ky.) 450; *Cadogan v. Kennett*, 2 Cowp. at p. 434; *Bank of United States v. Lee*, 13 Pet. 107, 10 L. Ed. 81.

⁴⁰ *Cadogan v. Kennett*, 2 Cowp. 434.

⁴¹ *Penrose v. Martyr*, E. B. & E. 499.

other statute for preventing false and double returns to parliament, which gave every person grieved by a false return a right of action against the returning officer.⁴² Such statutes, so far as they inflict a penalty on the offender, are strictly construed; but where they act on the offense by setting aside the fraudulent transaction, they are construed liberally.⁴³ An act that no member of the common council of a city, or other officer of the corporation, should be directly or indirectly interested in any contract, work or business, the price or consideration of which was to be paid for from the city treasury, was held to apply to a newspaper owned by the health commissioner of the city and designated to publish the proceeding of the common council. This restriction was deemed highly salutary. It was designed to prevent persons employed and appointed to promote and protect the public interest from being diverted from those objects by the temptation of the pecuniary advantages they might otherwise secure to themselves. The policy of it is similar to that which courts of equity have, from a high sense of duty, imposed upon all persons acting in the capacity of trustees. Instead of being unreasonably restrained by construction, the provision should be liberally applied for the promotion of the end designed to be accomplished by its enactment.⁴⁴

§ 684 (445). Whenever a penal statute is declared to be remedial by a provision therein, as, for example, a law against gaming, a strict construction will not be applied.⁴⁵ Where all civil laws are required by statute to be liberally construed, with a view to effect their objects and to promote justice, the courts must obey the statutory rule; never-

⁴² *Wynne v. Middleton*, 1 Wils. 125; *Wilb. on St.* 234.

⁴³ 1 *Black. Com.* 88; *Twyne's Case*, 3 Co. 82b; *Cadogan v. Kennett*, 2 *Cowp.* 432, 434; *Gorton v. Champneys*, 1 *Bing. at p.* 301; *Cumming v. Fryer, Dudley (Ga.)*, 182; *Carey*

v. Giles, 9 *Ga.* 253; *Ellis v. Whitlock*, 10 *Mo.* 781; *Smith v. Moffat*, 1 *Barb.* 65.

⁴⁴ *Mullaly v. Mayor, etc.*, 6 *T. & C.* 168.

⁴⁵ *Seal v. State*, 13 *Sm. & M.* 286.

theless, to authorize an attachment, all material requirements must be substantially complied with.⁴⁶

§ 685 (439). **Arbitration statutes.**—Statutory provisions in relation to arbitrations are liberally construed.⁴⁷ They tend to advance the public welfare by putting an end to litigation, and discouraging a multiplicity of suits; and the parties cannot complain of them because the arbitrators are judges of their own selection, and cannot assume jurisdiction outside of the submission, nor bind the parties beyond their consent, as evidenced by the submission.⁴⁸ Where the reference and award are in substantial compliance with the statute, they will be upheld as made under it.⁴⁹ Where a cause depending before a justice of the peace was, by agreement of the parties, submitted to arbitrators, who made an award which was entered up in the judgment of the court, from which an appeal was taken, it was held that the award was final unless impeached on the grounds mentioned in the statute — corruption, want of notice, or other misconduct of the arbitrators. “It is wholly unimportant,” say the court, “whether the award is made under the statute or not, as it is equally conclusive as an award at common law, and can only be impeached” on those grounds.⁵⁰ The statute should be liberally construed; but still the parties acting under it must substantially pursue its provisions; otherwise the award of arbitrators cannot be made a judgment of the court.⁵¹ Where a statute which provided a mode of submitting causes to arbitration enacted that each party should choose one arbitrator, and by the arbitrators thus chosen an umpire should be selected, and it was objected that the award was not a good statutory award, on the ground that

⁴⁶ *Dunnenbaum v. Schram*, 59 St. 418; *Owens v. Withee*, 3 Tex. 281.

⁴⁷ *Tuskaloosa Bridge Co. v. Jemison*, 33 Ala. 476; *Tankersley v. Richardson*, 2 Stewart, 130; *Wright v. Bolton*, 8 Ala. 548; *Mobile Bay Road Co. v. Yeind*, 29 id. 325; *Bingham's Trustees v. Guthrie*, 19 Pa.

St. 418; *Owens v. Withee*, 3 Tex. 161.
⁴⁸ *Tuskaloosa Bridge Co. v. Jemison*, 33 Ala. 476.

⁴⁹ *Id.*

⁵⁰ *Wright v. Bolton*, 8 Ala. 548.

⁵¹ *Owens v. Withee*, 3 Tex. 161.

by the terms of the agreement each party appointed an arbitrator, who then appointed the third man, and the cause was tried by the three, in the first instance, it was held that the objection went to the form merely, and was invalid.⁵² A statute prescribing certain forms for submission to arbitrators, and allowing parties to agree that a judgment of a court of record designated in the instrument of submission should be rendered upon the award, is cumulative, not exclusive; and an award pursuant to the submission which would have been valid at common law, but which does not conform to the statute, will support an action.⁵³

§ 686 (435). **Acts relating to judicial procedure, pleading, practice, etc.**—Statutes enacted to promote and facilitate the administration of justice are prominent in the category of remedial statutes.⁵⁴ Statutes providing for amendment of pleadings and proceedings in the courts are remedial and receive a very liberal construction.⁵⁵ To remedy the evils consequent upon the destruction of any public record by fire or otherwise, a statute was passed. It was held remedial though it altered the rules of evidence, as in

⁵² Forshey v. Railroad Co., 16 Tex. 516.

⁵³ Browning v. Wheeler, 24 Wend. 258, 35 Am. Dec. 617; Diedrick v. Richley, 2 Hill, 271; Burnside v. Whitney, 21 N. Y. 148. This is not perhaps in any proper sense the result of liberal construction of the statute, but of the general rule that a new remedy created by statute where one exists at common law is cumulative unless a different intention is expressed; and that the legislature did not intend to make any innovation upon the common law further than the case requires. Burnside v. Whitney, *supra*. In Deerfield v. Arms, 20 Pick. 480, an award was held wholly inopera-

tive in such a case. The court say that to hold the party bound by the submission as upon an agreement for arbitration at common law would be to substitute a very different contract from that into which he entered.

⁵⁴ Mitchell v. Mitchell, 1 Gill, 66.

⁵⁵ Fidler v. Hershey, 90 Pa. St. 363; Bolton v. King, 105 id. 78; Dick's Appeal, 106 id. 589, 596; Goods of Ruddy, L. R. 2 P. & D. 330; Tyler v. Mutual District Messenger Co., 13 App. Cas. 267; Chicago, C. & St. L. Ry. Co. v. Bozarth, 91 Ill. App. 68; Bellant v. Brown, 78 Mich. 294, 44 N. W. 326; Philadelphia v. Christman, 6 Pa. Supr. Ct. 29.

making an abstract of title evidence.⁵⁶ Acts providing for a change of venue for convenience of witnesses or to obtain an impartial trial;⁵⁷ regulating practice or procedure,⁵⁸ or to expedite litigation,⁵⁹ are remedial.

Under an act to prevent delays in obtaining judgment on account of infrequent sessions of the courts, a permission therein to take judgment by default in vacation was construed to authorize a judgment to be entered by consent after service of process.⁶⁰ Where a limited jurisdiction is conferred by statute the construction is strict as to the *extent* of jurisdiction; but liberal as to the *mode* of proceeding.⁶¹ The proceedings of a landlord to remove his tenant, being dilatory and expensive, a summary remedy was provided by a statute in derogation of the common law. In that respect it was held it should be strictly construed. It was remedial because intended to remedy the evils alluded to, and so far it should be construed liberally; that looking at the remedy the courts should take care that it be made effectual, if possible, in the manner intended.⁶² A statute extending, and thus, therefore, amending a similar statute affording a summary remedy, has been held to be remedial and to receive a liberal exposition. This was held in reference to the act of forcible entry and detainer, where the amendment consisted in extending it, first, to a vendor, under a contract of purchase, who has entered into possession before obtaining a deed and who refuses to comply with the contract; and second, to the case where lands have been sold under a judgment or decree and the party to such decree, after the time of redemption, refuses after

⁵⁶ Smith v. Stevens, 82 Ill. 554.

⁶⁰ Hoguet v. Wallace, 28 N. J. L.

⁵⁷ Griffin v. Leslie, 20 Md. 15; 523.

Wright v. Hanmer, 5 id. 375.

⁶¹ Russell v. Wheeler, Hempst. 3,

⁵⁸ Hoguet v. Wallace, 28 N. J. L. 523; Buck v. Eureka, 97 Cal. 135, 31

Fed. Cas. No. 12,164a; Barret v. Chitwood, 2 Bibb, 431.

Pac. 845; Heman v. McNamara, 77 Mo. App. 1.

⁶² Smith v. Moffat, 1 Barb. 65; Lynde v. Noble, 20 John. 80; Wil-

⁵⁹ People v. Tibbets, 4 Cow. 384; 2 Inst. 251. 325. 392.

kinson v. Colley, 5 Burr. at p. 2698.

demand to surrender possession.⁶³ The amendment was held under the first clause to make the act applicable to one put in possession by such vendee, and under the second to make it applicable to a party purchasing the subject *pendente lite*. Without questioning the correctness of this decree it is proper to say that statutes providing for summary remedies are strictly construed. Why should not a later act merely extending such summary remedy be governed by the same rule?⁶⁴ A provision introduced by amendment to extend it ought afterwards to be construed precisely as it would be construed had it been a part of the act as originally enacted. As an amendment it is intended to extend the summary remedy and to supply a defect in the existing law, but only in the sense in which the original act was intended to correct a defect in the existing law affording a different remedy in such cases. Such acts are within the definition of remedial laws; for that reason they should be liberally construed; but both the original and amendatory acts being in derogation of the common law and providing a summary remedy, they are subject to another rule requiring strict construction, which more than neutralizes the rule of liberal construction due to a remedial statute.

§ 687 (436). By the probate procedure act of California a creditor of a decedent's estate is required to present his claim duly verified to the executor or administrator within ten months after publication of notice by such executor or administrator, otherwise it is barred. An amendatory act was passed adding a proviso "that when it is made to appear by the affidavit of the claimant to the satisfaction of the executor or administrator and the probate judge, that the claimant had no notice as provided in this act, by reason of being out of the state, it [the claim] may be presented at any time before a decree of distribution is entered." This amendment was held in that state to be remedial.⁶⁵

⁶³ Jackson v. Warren, 32 Ill. 331.

⁶⁴ *Ante*, § 589.

⁶⁵ Cullerton v. Mead, 22 Cal. 95.

Such it obviously is, for it creates a meritorious exception to an arbitrary rule. A statute of Massachusetts provided that "when an executor or administrator dies or is removed from office during the pendency of a suit in which he is a party, the suit may be prosecuted by or against the administrator *de bonis non*," etc. By a liberal construction it has been held in that state that an administrator *de bonis non* to succeed an administratrix, whose marriage extinguished her authority, was within that provision. All the reasons which induced the passage of that law apply to such a case; all the mischief which it was intended to remedy would otherwise exist in such a case, namely, delay in the settlement of the estate, the loss of judgments already recovered, of attachments and costs. "In making this decision," say the court, "we apply an old and unshaken rule in the construction of statutes, to wit, that the intention of a remedial statute will always prevail over the literal sense of its terms, and, therefore, when the expression is special or particular, but the reason is general, the expression should be deemed general."⁶⁶

§ 688 (437). Statutes are remedial which are intended to promote the convenience of suitors.⁶⁷ So are statutes to improve the procedure for obtaining legal redress, so far as the rights of another party are not unduly prejudiced.⁶⁸ A statute declared that it should be lawful for any one who had a cause of action against an insurance company "to bring suit in any county where the property insured may be located." Its language did not apparently include life and accident insurance companies, both of which were equally within the

⁶⁶ Brown v. Pendergast, 7 Allen, 427, citing Co. Lit. 24b; Beawfage's Case, 10 Co. 101b; Dwarr. on St. (2d ed.) 616; Whitney v. Whitney, 14 Mass. 92, 93; People v. Utica Ins. Co., 15 John. 381; Crane v. Alling, 2 Green (N. J.), 593; Winslow v. Kimball, 25 Me. 495; Murphy v. Leader, 4 Irish L. 143; Jebb & Bourke, 75; 1 Kent's Com. (6th ed.) 461, 462.
⁶⁷ Hoguet v. Wallace, 28 N. J. L. 523; Griffin v. Leslie, 20 Md. 15; Mitchell v. Mitchell, 1 Gill, 66; Smith v. Moffat, 1 Barb. 65.
⁶⁸ Simonton v. Barrell, 21 Wend. 363; Sprowl v. Lawrence, 33 Ala. 674.

mischief that required a remedy, and a supplemental act was passed, enacting that all provisions of the former act "shall apply to life and accident insurance companies." This was construed to authorize suits to be brought in the counties where the person insured resided — where the subject of the risk insured against was domiciled or located.⁶⁹ The requirement that a trial judge, on the request of either party, file his charge to the jury of record in the cause, when complied with, makes the charge a part of the record without anything more; it is not necessary to embody in it a bill of exceptions to make it a part of the record on error.⁷⁰ The statute allowing a defendant in ejectment to set off the value of improvements against mesne profits is remedial.⁷¹ A statute requiring a court having power to issue a commission in the nature of a writ *de lunatico inquirendo*, to decide and direct who shall pay all the costs attendant upon the issuing and execution of such commission, was held remedial, and to be construed accordingly.⁷² A statute authorizing an officer of a municipal corporation to take all proper and necessary means to open and reverse judgments which he has reason to believe had been obtained by collusion, or founded in fraud, is a beneficial act, intended to protect the treasury against fraud, and should be very liberally construed; it was held that the officer need not disclose what has caused him to so believe.⁷³ Where a justice of the peace of another town in the same county, next adjoining the residence of the plaintiff, has jurisdiction to try an action, two towns contiguous at either corner are adjoining towns within the meaning of the statute, in the absence of any legal definition to show what distance the junction of two towns must continue in order to adjoin.⁷⁴ Statutes governing the

⁶⁹ Quinn v. Fidelity Ben. Ass'n, 100 Pa. St. 382.

⁷² Hassenplug's Appeal, 106 Pa. St. 527.

⁷⁰ Downing v. Baldwin, 1 S. & R. 298; Wheeler v. Winn, 53 Pa. St. 123, 127, 91 Am. Dec. 186.

⁷³ Sharp v. Mayor, etc., 81 Barb. 572.

⁷¹ Learned v. Corley, 43 Miss. 687, 697.

⁷⁴ Holmes v. Carley, 31 N. Y.

practice and procedure in justice courts should be construed so as to make it possible for any plain common-sense citizen to there appear and prosecute an ordinary action.⁷⁵

§ 689 (438). Acts which promote the public convenience in criminal prosecutions and involve no hardship or injustice to the accused are remedial. A statute which provided that "when a person shall commit an offense on board of any vessel or float he may be indicted for the same in any county through any part of which such vessel or float may have passed on that trip or voyage," was held not confined to that part of the trip or voyage which had been performed before the offense was committed, but extended to the entire trip.⁷⁶ Where a vessel had started on her voyage, and it was still intended to prosecute it, though when the offense was committed and for two days previously she was lying at anchor in a river by reason of adverse winds, it was held, nevertheless, that she was navigating the river within the meaning of a statute relating to offenses on board of vessels navigating any river. The statute did not define any crime or fix the punishment, but only changed the venue. It was not, properly speaking, a penal statute. It was held that the court was not bound to give it such straitened construction as would turn it into legal nonsense by holding that it only applied while the vessel was moving.⁷⁷ By a general statute of New Hampshire a justice of the peace was given jurisdiction to hear and determine prosecutions and actions of a criminal nature arising within his county, where the punishment was by fine not exceeding \$10.⁷⁸ By another statute it was provided that "if any person shall wilfully and maliciously commit any act whereby the real or personal estate of another shall be injured, such person shall be punished by imprisonment in the common jail for a term not less than thirty days nor more than one year, or by a fine not exceeding \$100, or by both said punishments, in the

⁷⁵ *Lemon v. Lloyd*, 46 Mo. App. 452.

⁷⁷ *People v. Hulse*, 3 Hill, 309.

⁷⁶ *Nash v. State*, 2 Greene (Iowa),

⁷⁸ Rev. Stat. 1851, sec. 1, ch. 222.

discretion of the court.”⁷⁹ The statute did not expressly designate the tribunal to try the offenses committed under it. The court say:⁸⁰ “We cannot believe it to have been the purpose of the law-making power to ordain that the minor offenses under this act should be sent in the first instance to the grand jury for their investigation, rather than to the justices of the peace in the several counties where they were committed. It seems to us that the malicious act involved or implied in destroying by poison twelve hens or chickens may, with entire propriety, under the general law regulating the jurisdiction of justices of the peace, be investigated and finally settled, and punished under the decision of a justice of the peace.” With a view to judicious administration of justice, the court does not exclude from the jurisdiction of a justice all cases which arise under the statute, though it prescribes a punishment generally for that class of offenses beyond the jurisdiction of such a court.

§ 690. **Mechanics’ lien statutes.**—There is a difference of opinion as to whether mechanics’ lien statutes should be construed strictly or liberally. Some courts regard them as in derogation of the common law and to be strictly construed and, therefore, as not to be extended by construction or implication to persons or cases not clearly within their language.⁸¹ In one of the cases cited it is said that a strict

⁷⁹ Comp. St. 1853, ch. 229, sec. 19.

⁸⁰ In *State v. Towle*, 48 N. H. 97.

⁸¹ *Scaife v. Stovall*, 67 Ala. 237; *Mills v. La Verne Land Co.*, 97 Cal. 254, 32 Pac. 169; *Rice v. Carmichael*, 4 Colo. App. 84, 34 Pac. 1010; *Sayre-Newton Lumber Co. v. Park*, 4 Colo. App. 483, 36 Pac. 445; *Chapin v. Persse & Brooks Paper Works*, 30 Conn. 461, 474; *Rothgerber v. Dupuy*, 64 Ill. 452; *Huntington v. Barton*, 64 Ill. 502; *Carney v. Tully*, 74 Ill. 375; *Belanger v. Hersey*, 90 Ill. 70; *Shaw v. Chicago Sash, etc. Co.*, 144 Ill. 520, 83 N. E. 870; *Logan*

v. Attix, 7 Iowa, 77; *General Fire Extinguisher Co. v. Chaplin*, 183 Mass. 375, 67 N. E. 321; *Wagar v. Briscoe*, 38 Mich. 587; *Farmers’ Bank v. Winslow*, 3 Minn. 86; *Jones v. Alexander*, 10 S. & M. 627; *Minor v. Marshall*, 6 N. M. 194, 27 Pac. 481; *Mushlit v. Silverman*, 50 N. Y. 360; *Roberts v. Fowler*, 3 E. D. Smith, 632; *McMahon v. Hodge*, 2 Misc. 234, 21 N. Y. S. 971; *Appeal of McCay*, 37 Pa. St. 125; *Womelsdorf v. Heifner*, 104 Pa. St. 1; *Richardson v. Norfolk & W. Ry. Co.*, 37 W. Va. 641, 17 S. E. 195.

construction does not mean an arbitrary, inequitable or harsh construction and that a substantial compliance with the statute is sufficient.⁸² Other courts hold that these statutes are remedial and should be liberally construed.⁸³ "These statutes are remedial in their nature and should be given a liberal construction so as to carry out their just and beneficent objects."⁸⁴ Notwithstanding this apparent diversity there is probably no great difference in the actual results of construction arrived at by the different courts. The New York courts have leaned towards a strict construction of such laws, but the liberal constructionist can find no fault with the proposition stated in a recent case, in reference to such a law, that "while it must receive a liberal construction to secure the beneficial purposes which the legislature had in view, it cannot be extended to a state of facts not fairly within its general scope and purview."⁸⁵ It has been held that such a statute should be construed strictly as to the things to be done to obtain a lien and liberally as to the enforcement of the lien after it has attached;⁸⁶ also that it should be construed strictly as to the persons entitled to a lien but liberally as respects the property to which the lien attaches.⁸⁷

⁸² *Minor v. Marshall*, 6 N. M. 194, 27 Pac. 481.

⁸³ *Cocciola v. Wood-Dickerson Supply Co.*, 136 Ala. 532, 33 So. 856; *White v. Chaffin*, 32 Ark. 59, 69; *Greeley, S. L. & P. R. R. Co. v. Harris*, 12 Colo. 226, 20 Pac. 764; *Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456; *Clark v. Huey*, 12 Ind. App. 224, 40 N. E. 152; *Sharpe v. Spengler*, 48 Miss. 360; *Oster v. Rabeneau*, 46 Mo. 595; *De Witt v. Smith*, 63 Mo. 263; *Dugan Cut Stone Co. v. Gray*, 114 Mo. 497, 21 S. W. 854, 35 Am. St. Rep. 767; *White Lake Lumber Co. v. Russell*, 22 Neb. 126, 34 N. W. 104, 3 Am. St. Rep. 262; *Ford v. Springer Land*

Ass'n, 8 N. M. 37, 41 Pac. 541 (overruling former cases to the contrary); *Spruck v. McRoberts*, 139 N. Y. 193, 34 N. E. 896; *Steger v. Arctic Refrigerating Co.*, 89 Tenn. 453, 14 S. W. 1087, 11 Am. St. Rep. 580.

⁸⁴ *Dugan Cut Stone Co. v. Gray*, 114 Mo. 497, 21 S. W. 854, 35 Am. St. Rep. 767.

⁸⁵ *Spruck v. McRoberts*, 139 N. Y. 193, 197, 34 N. E. 896.

⁸⁶ *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 20 Pac. 744.

⁸⁷ *Nanz v. Park Co.*, 103 Tenn. 299, 52 S. W. 999, 76 Am. St. Rep. 650. To same effect, *United States v. Burgdorf*, 13 App. Cas. (D. C.) 506.

§ 691. An amendatory act provided that when the improvement consists of two or more buildings united together and situated upon the same lot or contiguous lots, or of separate buildings upon contiguous lots, and erected under one general contract, it should not be necessary to file a separate lien upon each building, but all might be included in one claim. Before this it was necessary to file separate liens in such cases, and to show what particular labor and materials went into each building. The amendment did not specify the case of separate buildings on the same lot, but it was held that such a case was within the reason and intent of the statute.⁸⁸ Under a statute giving a lien for labor or materials put into a house or building it has been held that one constructing a house drain partly in the street may have a lien for the whole cost upon the house.⁸⁹ So of one who constructed a refrigerating plant in a building with pipes in the street for distribution.⁹⁰ The fact that materials are sold and delivered outside of the state is held to make no difference in the right to a lien therefor.⁹¹

⁸⁸ *Cocciola v. Wood-Dickerson Supply Co.*, 136 Ala. 532, 33 S. E. 856. The court says: "In arriving at the intention of the law giver in a construction of the statute before us, to say that the intention was to give a lien under one general contract, on 'separate buildings upon contiguous lots,' and not on 'separate buildings on the same lot,' would be, we think, an absurd conclusion. The difficulties and defects under the old law intended to be obviated by the statute are more likely to arise in cases where the separate buildings are on the same lot than where they are on separate and different lots. Taking the history of the statute, the defects which existed, and which it was intended to rem-

edy, and the rule of construction, that we must look rather to the intention than the letter of the law, our conclusion is that the statute was intended to apply and does apply to materials furnished for the erection of separate houses on the same lot under one general contract." pp. 536, 537.

⁸⁹ *Beatty v. Parker*, 141 Mass. 523.

⁹⁰ *Steger v. Arctic Refrigerating Co.*, 89 Tenn. 453, 14 S. W. 1087, 11 Am. St. Rep. 580.

⁹¹ *Thompson v. St. Paul City Ry. Co.*, 45 Minn. 13, 47 N. W. 259; *Fagan v. Boyle Ice Machine Co.*, 65 Tex. 324; *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071. But see *Birmingham Iron Foundry v. Glen Cove Starch Co.*, 78 N. Y. 30.

Where a statute gave a lien to one furnishing labor or materials, it was held not to entitle an architect to a lien for his fees.⁹² The court says: "This lien is purely statutory and unknown to the common law. Only those enumerated and embraced in the statute are entitled to the lien. A liberal construction of the mechanics' lien laws does not mean that they shall be liberally construed in embracing or including others than those enumerated in the statutes. It must clearly appear that the claimant has a lien. No one is entitled to a lien unless the statute includes him or them. They are not to be included by strained construction. Unless the statute gives the lien, the party has none."

Such statutes are usually held not to apply to public buildings, such as school-houses and the like.⁹³ "The ground of decision in such cases is that the buildings are held for a public use, and it is against public policy, in the absence of express provisions to the contrary, that the instrumentalities for carrying on the government should be the subject of seizure and sale for debt."⁹⁴ Whether, after a lien has accrued, it is a vested right, which cannot be affected by a repeal of the statute or other legislation, is a question upon which the authorities differ.⁹⁵ Ordinarily the lien is to be enforced according to the law in force when the proceedings are taken.⁹⁶

⁹² *Thompson v. Baxter*, 92 Tenn. 305, 21 S. W. 668, 36 Am. St. Rep. 85.

⁹³ *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451; *Lessard v. Revere*, 171 Mass. 294, 50 N. E. 533; *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380; *Young v. Falmouth*, 183 Mass. 80, 66 N. E. 419; *Jordan v. Board of Education*, 39 Minn. 298, 39 N. W. 801; *Burlington Mfg. Co. v. Board of Commissioners*, 67 Minn. 327, 69 N. W. 1091.

⁹⁴ *Young v. Falmouth*, 183 Mass. 80, 66 N. E. 419.

⁹⁵ Cases holding it a vested right: *Goodbub v. Estate of Hornung*, 127 Ind. 181, 26 N. E. 770; *Craig v. Herzman*, 9 N. D. 140, 81 N. W. 288; *State Trust Co. v. Kansas City, etc. R. R. Co.*, 115 Fed. 367; *Waters v. Dixie Lumber & Mfg. Co.*, 106 Ga. 592, 32 S. E. 636, 71 Am. St. Rep. 281. *Contra*, *Wilson v. Simon*, 91 Md. 1, 45 Atl. 1022, 80 Am. St. Rep. 427; *Dunwell v. Bidwell*, 8 Minn. 18. ⁹⁶ *St. Croix Lumber Co. v. Mitchell*, 6 Dak. 215, 50 N. W. 624; *Goodbub v. Estate of Hornung*, 127 Ind. 181, 26 N. E. 770; *Tell v. Woodruff*,

§ 692. **Other lien laws.**—Statutes which give a lien for services upon logs and timber are construed liberally in favor of the laborer.⁹⁷ So of statutes giving a lien to miners.⁹⁸ In both the above classes of statutes *labor* is held to include the services of an overseer, custodian or contractor.⁹⁹ A statute giving a livery-stable keeper a lien for the support of stock was held to apply to a horse exempt from execution.¹ A statute as to the enforcement of the common-law lien on an article repaired was held to be remedial and to be liberally construed.² A log lien has been held to be a vested right after it has accrued, which is not affected by a repeal of the statute.³

§ 693. **Exemption statutes.**—The authorities are very nearly unanimous in holding that exemption statutes should receive a liberal construction.⁴ A statute which exempted

45 Minn. 10, 47 N. W. 262; Garland v. Irrigation Co., 9 Utah, 350, 34 Pac. 368; Allen v. Schweigert, 110 Ga. 323, 35 S. E. 315; Nystrom v. London, etc. Mortg. Co., 47 Minn. 31, 49 N. W. 394; Bear Lake & Riv. W. W. & Irr. Co. v. Garland, 164 U. S. 1, 17 S. C. Rep. 7, 41 L. Ed. 327. But see Chicago Lumber Co. v. Dillon, 13 Colo. App. 196, 56 Pac. 989; Kinsey v. Eilerman, 110 Ky. 948; Hill v. Lovell, 47 Minn. 293, 50 N. W. 81.

⁹⁷ Phillips v. Freyer, 80 Mich. 254, 45 N. W. 81; Kollock v. Parcher, 25 Wis. 372; Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490; Jacubeck v. Hewitt, 61 Wis. 96, 20 N. W. 372.

⁹⁸ Rico Reduction & Min. Co. v. Musgrave, 14 Colo. 79, 23 Pac. 458; McLaren v. Byrnes, 80 Mich. 275, 45 N. W. 143.

⁹⁹ McLaren v. Byrnes, 80 Mich. 275, 45 N. W. 143; Phillips v. Freyer, 80 Mich. 254, 45 N. W. 81, overruling Kielsen v. Wilson, 77 Mich. 45, 43 N. W. 1054.

¹ Flint v. Luhrs, 66 Minn. 57, 68 N. W. 514, 61 Am. St. Rep. 391.

² Watts v. Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615.

³ Garneau v. Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463.

⁴ Kennedy v. First National Bank, 107 Ala. 170, 18 So. 396, 36 L. R. A. 308; Butler v. Shumway, 16 Colo. 95, 26 Pac. 321; Price v. Society for Savings, 64 Conn. 362, 30 Atl. 139, 42 Am. St. Rep. 198; Davidson v. Hannon, 67 Conn. 312, 34 Atl. 1050, 52 Am. St. Rep. 282, 34 L. R. A. 718; Davis v. Siegel, Cooper & Co., 80 Ill. App. 278; McClellan v. Powell, 109 Ill. App. 222; Pomeroy v. Beach, 149 Ind. 511, 49 N. E. 370; Charless v. Lamberson, 1 Iowa, 435; Davis v. Humphrey, 22 Iowa, 137; Alvord v. Lent, 33 Mich. 369; Hutchinson v. Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431; Olin v. Fox, 79 Minn. 459, 82 N. W. 858; Rustad v. Bishop, 80 Minn. 497, 83 N. W. 449, 81 Am. St. Rep. 282, 50 L. R. A. 168; Wauschoff v. Masonic

certain property of *persons with a family* was held to include a married woman who supported her husband and children by keeping a grocery.⁵ An exemption in favor of any mechanic, miner or other person not being the head of a family, of tools, etc., used in his trade or business, was held to include a married woman engaged in business.⁶ A statute exempted to the head of a family engaged in agriculture ten head of stock hogs, also twelve hundred pounds of pork slaughtered or on foot or nine hundred pounds of bacon. It was held that *pork on foot* included animals of any size and condition and not merely such as were suitable for slaughter, and that under the alternative clause the debtor was entitled to select both pork and bacon provided the aggregate, reduced to the value of either, did not exceed the amount fixed in the statute. A debtor having fifteen pounds of bacon was held to be entitled also to eleven hundred and eighty pounds of pork.⁷ "One yoke of work oxen" was held to include a steer and a bull, which had been yoked together and were intended to be used as a yoke of oxen, though they had never been so used.⁸ In the same case the term "milch cows" was held to include heifers with calf. "One farm horse or mule" was held to include a dray horse, though not used in farm work.⁹ Corn in the ear and standing in the shock was held to be exempt as provisions.¹⁰ Household furniture includes silverware and whatever con-

Mut. Benefit Society, 41 Mo. App. 206; Bovard v. Kansas City, etc. Ry. Co., 83 Mo. App. 498; Nelson v. Fightmaster, 4 Okl. 38, 44 Pac. 213; Byous v. Mount, 89 Tenn. 361, 17 S. W. 1037; Heath v. Griffen, 11 Wash. 466, 39 Pac. 962, 48 Am. St. Rep. 885; Comstock v. Bechtel, 63 Wis. 656, 24 N. W. 465; Binzel v. Grogan, 67 Wis. 147, 29 N. W. 895; Thompson on Homesteads and Exemptions, § 4. *Contra*, Buckingham v. Billings, 13 Mass. 82; Dan-

forth v. Woodward, 10 Pick. 423, 20 Am. Dec. 531.

⁵ Wilson's Assignee v. Wilson, 101 Ky. 731, 42 S. W. 404.

⁶ Scott v. Mills, 7 Colo. App. 155, 42 Pac. 1021.

⁷ Byous v. Mount, 89 Tenn. 361, 17 S. W. 1037.

⁸ Nelson v. Fightmaster, 4 Okl. 38, 44 Pac. 213.

⁹ Kirksey v. Rowe, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65.

¹⁰ Cochran v. Harvey, 88 Ga. 352, 14 S. E. 580.

tributes to the use or convenience of the householder or the ornament of the house.¹¹ A piano was held not to be household goods, furniture or utensils within an exemption statute.¹² An exemption of "all tools, apparatus and books belonging to any trade or profession" was held not to include a bicycle belonging to an architect.¹³

Insurance money received for the destruction of exempt property was held to be exempt for a reasonable time, to allow for re-investment in similar property.¹⁴ Where wages were exempt it was held that they continued exempt though collected and deposited in a bank.¹⁵ A statute exempted "any pension moneys received from the United States while in the hands of the pensioner." It was held that they were exempt while deposited in a savings bank.¹⁶ Where a judgment is exempt it continues so, though transferred by an assignment fraudulent as to creditors.¹⁷ Exemption statutes apply to non-residents as well as to residents.¹⁸ A statute restricting the operation of an exemption statute will be strictly construed.¹⁹ In the case cited a statute provided that no personal property should be exempt from attachment or execution, when the debt or judgment is for the wages of a laborer or servant.

Some cases on the construction of acts giving a preference

¹¹ *McClellan v. Powell*, 109 Ill. App. 222.

¹² *Kehl v. Dunn*, 102 Mich. 581, 61 N. W. 71, 47 Am. St. Rep. 561.

¹³ *Smith v. Horton*, 19 Tex. Civ. App. 28, 46 S. W. 401.

¹⁴ *Heath v. Griffen*, 11 Wash. 466, 39 Pac. 962, 48 Am. St. Rep. 885; *Reynolds v. Haines*, 83 Iowa, 342, 49 N. W. 851, 32 Am. St. Rep. 311; *Houghton v. Lee*, 50 Cal. 101; *Cameron v. Fay*, 55 Tex. 63. *Contra* in case of homestead, *Smith v. Ratcliff*, 66 Miss. 683, 6 So. 460, 14 Am. St. Rep. 606.

¹⁵ *Butler v. Shumway*, 16 Colo. 95, 26 Pac. 321.

¹⁶ *Price v. Society for Savings*, 64 Conn. 362, 30 Atl. 139, 42 Am. St. Rep. 198.

¹⁷ *Green v. Baxter*, 91 Mo. App. 633; *Davis v. Land*, 88 Mo. 436; *Bank v. Guthrey*, 127 Mo. 189, 29 S. W. 1004, 48 Am. St. Rep. 621; *Bartels v. Kinnenger*, 144 Mo. 370, 46 S. W. 163.

¹⁸ *Bond v. Turnier*, 33 Ore. 551, 54 Pac. 153.

¹⁹ *Dickinson v. Rohn*, 98 Ill. App. 245.

to the wages of laborers and employees in case of insolvency are referred to in the margin.²⁰

Homestead exemption laws rest upon the same reason as other exemption laws, and are as a rule liberally construed.²¹

§ 694. Attachment and garnishment statutes.— These statutes are strictly construed, and a party seeking their benefit must bring himself clearly within their terms.²² In Illinois it is held that the words of the statute as to what may be attached should receive a liberal construction.²³ The words *rights and effects* were held to include shares of stock. In some states it is provided by statute that such acts shall be liberally construed.²⁴ Such acts do not take away the jurisdiction of equity in creditors' bills.²⁵ The levy of an attachment or service of process in garnishment gives no vested right.²⁶ Such statutes are held not to apply to mu-

²⁰ Appeal of Black, 83 Mich. 513, 47 N. W. 342; Bank of Montreal v. Potts Salt & L. Co., 92 Mich. 354, 52 N. W. 637; Appeal of Clark, 100 Mich. 448, 59 N. W. 150; Boyle v. Vanderhoof, 45 Minn. 31, 47 N. W. 396; Pullis Bros. Iron Co. v. Boemler, 91 Mo. App. 85; Johnston v. Barrills, 27 Ore. 251, 41 Pac. 656, 50 Am. St. Rep. 717. In the last case it is held that such statutes are to be strictly construed in arriving at who is entitled to their benefit.

²¹ King v. Welborn, 83 Mich. 195, 47 N. W. 106, 9 L. R. A. 803; Lindley v. Davis, 7 Mont. 206, 14 Pac. 717; Jackson v. Shelton, 89 Tenn. 82, 16 S. W. 142; Loftis v. Loftis, 94 Tenn. 232, 21 S. W. 1091; Folsom v. Asper, 25 Utah, 299, 71 Pac. 315; Virginia & Tenn. C. & I. Co. v. McClelland, 98 Va. 424, 36 S. E. 479. See Chapman v. McGrath, 163 Mo. 292, 63 S. W. 832; Richter v. Bohnsack, 144 Mo. 516, 46 S. W. 748; Casler v.

Gray, 159 Mo. 588, 60 S. W. 1032; Ford v. Clement, 68 Minn. 484, 71 N. W. 672; Lundberg v. Sharvey, 46 Minn. 350, 49 N. W. 60; Farris v. Sipes, 99 Tenn. 298, 41 S. W. 443.

²² Ordenstein v. Bones, 2 Ariz. 229, 12 Pac. 614; Eck v. Hoffman, 55 Cal. 502; Smith v. Armour, 1 Penn. (Del.) 361, 40 Atl. 730; Ball v. Lastinger, 71 Ga. 678; McCrea v. Russell, 100 Mich. 375, 58 N. W. 1118; Altmeyer v. Caulfield, 37 W. Va. 847, 17 S. E. 409; Reed v. McCloud, 38 W. Va. 701, 18 S. E. 924; *ante*, § 569.

²³ Union National Bank v. Byram, 131 Ill. 92, 22 N. E. 842.

²⁴ White v. Simpson, 107 Ala. 386, 18 So. 151.

²⁵ Sabin v. Anderson, 31 Ore. 487, 49 Pac. 870; Northrup v. Hoyt, 31 Ore. 524, 49 Pac. 754.

²⁶ Steers v. Kinsey, 68 Ark. 360, 58 S. W. 1050; Wooding v. Puget Sound National Bank, 11 Wash. 527, 40 Pac. 223; Johnson v. Hill, 90 Wis.

municipal or other public corporations in the absence of express words to that effect.²⁷

§ 695 (373). **Civil damage acts.**—This appellation is commonly applied to acts which impose a liability on the vendors of intoxicating liquors for injuries resulting from intoxication,²⁸ and on the lessors of property occupied for that traffic.²⁹ These acts give certain enumerated persons standing in some relation to the person from whose intoxication or habitual inebriety proceeds injury to means of support or otherwise, a right of action for compensatory damages, and often exemplary damages. The remedial element in this legislation is a potent factor in the interpretation of its general language; consequently the conservative principle of strict construction of a statutory liability has to a great extent received secondary consideration. The courts have aimed to give effect to and carry out the humane and ameliorating policy of these laws; and while they do not transcend their letter, they do not greatly restrict their broad terms. In a case of this nature³⁰ the court said: "It cannot be doubted that the statute which we are considering comes within the class of remedial statutes, nor that under

19, 62 N. W. 930, 46 Am. St. Rep. 815; *Freiberg v. Singer*, 90 Wis. 603, 63 N. W. 754; *Evans-Snyder-Buell Co. v. McFadden*, 105 Fed. 293, 44 C. C. A. 494; *McFadden v. Evans-Snyder-Buell Co.*, 185 U. S. 505, 22 S. C. Rep. 758, 46 L. Ed. 1012. Compare *Davis v. H. B. Claffin Co.*, 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 936, 58 Am. St. Rep. 102, 35 L. R. A. 776; *Day v. Madden*, 9 Colo. App. 464, 48 Pac. 1053; *Mulnix v. Spratlin*, 10 Colo. App. 390, 50 Pac. 1078; *Conrad v. Smith*, 6 N. D. 337, 70 N. W. 815.

²⁷ *Skelly v. School District*, 103 Cal. 652, 37 Pac. 643; *Sterner v. La Plata County*, 5 Colo. App. 379, 38 Pac. 839; *Dollman v. Moore*, 70 Miss.

267, 12 So. 23, 19 L. R. A. 222; *Kein v. School District*, 42 Mo. App. 460; *ante*, §§ 605, 690.

²⁸ *Bodge v. Hughes*, 53 N. H. 614; *Brooks v. Cook*, 44 Mich. 617, 7 N. W. 216; *Friend v. Dunks*, 37 Mich. 25; *English v. Beard*, 51 Ind. 489; *Jackson v. Noble*, 54 Iowa, 641, 7 N. W. 88; *Medbury v. Watson*, 6 Met. 246, 39 Am. Dec. 726; *Thorpe v. R. & B. R. Co.*, 27 Vt. 140; *In re Jacobs*, 98 N. Y. 98.

²⁹ *Bertholf v. O'Reilly*, 74 N. Y. 509; *McGee v. McCann*, 69 Me. 79; *Hill v. Berry*, 75 N. Y. 229; *Meyers v. Kirt*, 57 Iowa, 421, 10 N. W. 828.

³⁰ *Buckmaster v. McElroy*, 20 Neb. 557, 57 Am. Rep. 843.

the above authorities³¹ we have ample warrant, were it necessary, for giving it the most liberal construction in the interest of justice and humanity." The Michigan statute enumerates as entitled to sue "every wife, child, parent, guardian, husband or other person." The inebriate himself was held not included, and not entitled to recover for money stolen from him while drunk. He is presumably injured in all cases, and the remedy should not be extended to him unless the intent to do so is unequivocally expressed.³² It was held that the general words "or other person," following the enumeration, must be understood to extend according to the general principle to persons of the same general character, sort or kind as those named.³³ From this it might be supposed that the injured person must stand in some relation to the intoxicated person. It had been intimated in a previous case³⁴ that strangers are embraced in the same clause with guardians, relatives, husbands and wives. In a late case³⁵ it was held that these general words were intended to cover all persons injured in person or property by the intoxicated person. As "parent" a mother may sue for damages to her, at least in the absence of evidence that there is a father.³⁶ Where the right of recovery is confined to injury to person, property or means of support, as in New

³¹ Sedgwick, 274; Dean and Chapter of York v. Middleburgh, 2 Y. & J. 196.

³² Brooks v. Cook, 44 Mich. 617, 7 N. W. 216.

³³ Citing Hawkins v. Great W. Ry. Co., 17 Mich. 57, 97 Am. Dec. 179; McDade v. People, 29 Mich. 50.

³⁴ Ganssly v. Perkins, 30 Mich. 492, 495.

³⁵ Flower v. Witkovsky, 69 Mich. 371, 37 N. W. 364; English v. Beard, 51 Ind. 489.

³⁶ Eddy v. Courtright, 91 Mich. 264, 51 N. W. 887; Weiser v. Welch, 112 Mich. 134, 70 N. W. 438; McNeil v. Collinson, 130 Mass. 167;

McNary v. Blackburn, 180 Mass. 141, 61 N. E. 885. In a suit by a mother for the intoxication of her son the court says: "It was competent for the plaintiff to introduce evidence showing her situation and condition; her dependence upon her son; the amount he earned before he became addicted to intoxicating liquors; his failure to obtain employment afterwards, if traceable to his drinking habit; the amount he had in bank and had earned at various times; and that he had been seen upon the street in a state of intoxication during the time it was claimed

York, a father, though one of the persons enumerated to sue, cannot maintain the action if there is no injury to person or property, unless the case shows that he was dependent on the son.³⁷ But in Massachusetts an adult son, not dependent on the father, when he has given notice forbidding sales to the latter, may maintain a suit, for the statute implies that other damages than to person, property or means of support may be recovered. The statute contemplates that the habitual drunkenness of a husband or wife, parent or child, is a substantial injury to those bound together in domestic relations, and gives a right to recover damages in the nature of a penalty not only for injury to the person or property, but for shame and disgrace brought upon them.³⁸ An Iowa statute declares a liability for compensation "to any person who may take charge of and provide for such intoxicated person." This provision was held not to include a physician who treated professionally one who was injured while intoxicated.³⁹

§ 696 (374). As to injuries for which damages may be recovered there are considerable differences in the statutes, and, as might be expected, noticeable contrariety of decision. It is essential where recoveries are allowed for injuries that there be actual damage. The right of action does not spring from the stated relationships alone; and though the statute may in terms authorize, in addition to compensation, exemplary damages, the latter will not be allowed unless there is actual injury.⁴⁰ Where the damage alleged is to the person, physical injury must be shown; it is not enough that opprobrious language was used.⁴¹ And to justify the award of exemplary damages, such circumstances of aggravation must be proven as are on general principles of the common

defendant Welch sold him liquor." *Weiser v. Welch*, 112 Mich. 134, 137, 70 N. W. 438.

³⁷ *Stevens v. Cheney*, 36 Hun, 1.

³⁸ *Taylor v. Carroll*, 145 Mass. 95, 13 N. E. 348. See *Friend v. Dunks*, 37 Mich. 25.

³⁹ *Sansom v. Greenough*, 55 Iowa, 127, 7 N. W. 482.

⁴⁰ *Ganssly v. Perkins*, 30 Mich. 493; *Calloway v. Laydon*, 47 Iowa, 456, 29 Am. Rep. 489.

⁴¹ *Calloway v. Laydon*, 47 Iowa, 456.

law sufficient to authorize their allowance. They will not be permitted unless the act of giving or selling the intoxicating drinks was wilful, wanton, reckless, or otherwise deserving of punishment beyond what the requirements of compensation would impose.⁴² In Ohio, however, a different rule has been announced. In that state it has been held that in all actions in which the plaintiff shows a right to recover damages actually sustained, the jury may also assess exemplary damages without proof of actual malice or other special circumstances of aggravation.⁴³ Such damages only as are the natural and proximate consequence of the cause mentioned in the statute are allowed. General principles of the common law govern in their ascertainment.⁴⁴ They are not, however, confined to the direct and immediate consequences of intoxication, or the habit of drunkenness. The statutes give damages for injuries resulting therefrom to person, property, means of support, and in some cases there is added, "or otherwise." A natural interpretation necessarily extends the right of recovery to consequential injuries as they affect the subjects mentioned. It is not deemed to be the intention of the statute to narrow damages to injuries from the liquor alone, exclusive of other agency. That would fall short of the remedy intended to be given. These statutes are designed for a practical end, to give a substantial remedy, and should be allowed to have effect

⁴² *Kadgin v. Miller*, 13 Ill. App. 474; *Kreiter v. Nichols*, 28 Mich. 496; *Meidel v. Anthis*, 71 Ill. 241; *Hackett v. Smelsley*, 77 id. 109; *Rawlins v. Vidvard*, 34 Hun, 205; *Davis v. Standish*, 26 id. 608, 616; *Neu v. McKechnie*, 95 N. Y. 632; *Roose v. Perkins*, 9 Neb. 304, 315, 31 Am. Rep. 409; *Bates v. Davis*, 76 Ill. 222; *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34; *Schafer v. Smith*, 63 Ind. 226; *McCarty v. Wells*, 51 Hun, 171; *Ketcham v. Fox*, 52 id. 284.

⁴³ *Schneider v. Hosier*, 21 Ohio St. 98.

⁴⁴ *Barks v. Woodruff*, 12 Ill. App. 96; *Tetzner v. Naughton*, id. 148; *Shugart v. Egan*, 83 Ill. 56; *Emory v. Addis*, 71 id. 273; *Hackett v. Smelsley*, 77 id. 109; *Schmidt v. Mitchell*, 84 id. 195; *Schroder v. Crawford*, 94 id. 357, 34 Am. Rep. 236; *Mulford v. Clewell*, 21 Ohio St. 191; *Neu v. McKechnie*, 95 N. Y. 632; *Friend v. Dunks*, 37 Mich. 25; *Ganssly v. Perkins*, 30 id. 492, 495.

according to their natural and obvious meaning.⁴⁵ The act of selling or giving away liquor to a drunkard, thereby making him drunk, is made by the legislature identical with creating the state of drunkenness which, in fact, ensues from the drinking. The party who thus furnishes the means of intoxication, and others who, like renters of premises for that use, abet it, are treated as represented causally in that intoxication; that they do by the intoxicated person the injury to person, property and means of support which naturally and proximately results from the intoxication.⁴⁶

§ 697 (375). But the consequences must spring from the cause mentioned in the statute, not from some other fortuitous circumstance, or the act of another person.⁴⁷ A wife cannot maintain an action for damages for an injury

⁴⁵ *Schroder v. Crawford*, 94 Ill. 357, 361, 34 Am. Rep. 236.

⁴⁶ See *Schafer v. State*, 49 Ind. 460.

⁴⁷ In *Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154, the court, in speaking of when an action can be maintained, says: "If the means of support are lessened, and this result can be traced to the sale of intoxicants, there is a right of recovery for such loss, as in case of lessened ability to labor, and loss of attention to business. *Wightman v. Devere*, 33 Wis. 570; *Hutchinson v. Hubbard*, 21 Neb. 33, 31 N. W. 245; *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337; *Schneider v. Hosier*, 21 Ohio St. 98. So, where sickness or insanity is the result of the intoxication. *Mulford v. Clewell*, 21 Ohio St. 191. And where expenses are incurred for care and medical attention. *Wightman v. Devere*, 33 Wis. 570. And where the husband was robbed while intoxicated, the wife was allowed to sue. *Franklin*

v. Schermerhorn, 8 Hun, 112. And, so, where the husband spends the wife's money for drink. *McEvoy v. Humphrey*, 77 Ill. 388. And the mother was allowed to recover for injuries where the son overdrove her horse on account of drink. *Bertholf v. O'Reilly*, 8 Hun, 16. The mere spending by the husband of his own money, it has been said, will give a right of action by the wife. *Quain v. Russell*, 8 Hun, 319; *Mulford v. Clewell*, 21 Ohio St. 191; *Woolheather v. Risley*, 38 Iowa, 486; *Hackett v. Smelsley*, 77 Ill. 109. And so a widow, dependent on her son, may maintain an action for the sale of liquors to her son if it injures her means of support. *McClay v. Worrall*, 18 Neb. 44, 24 N. W. 429. So, too, as to a father, if dependent upon a son. *Stevens v. Cheney*, 36 Hun, 1; *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323."

received by her from falling on a slippery sidewalk while following her intoxicated husband to see where he obtained liquor.⁴⁸ Injuries to the person or property of another committed by the intoxicated person, acting on the perverted impulses or frenzies of intoxication, are recoverable.⁴⁹ And so far as the cause mentioned in the statute, intoxication or the habit, impairs the means of support by diminishing the capacity of the intoxicated person to earn money or prudently husband it, or by inducing him to squander it, an action will lie for the loss.⁵⁰ Means of support relate to the future as well as to the present. In maintaining an action for loss of it, it must appear that in consequence of the intoxication or the acts of the intoxicated person the plaintiff's accustomed means of maintenance have been cut off or curtailed, or that he has been reduced to a state of dependence by being deprived of the support which he had before enjoyed.⁵¹ Where the plaintiff's wife was killed by an intoxicated person, the court, in overruling a demurrer to the declaration, held that it could not say as matter of law that though she was dependent upon him the plaintiff had suffered no actionable damages by her death.⁵² In Michigan it has been held that a wife may recover for mental suffering caused by the disgrace and discomfort attendant upon the besotted condition of her husband.⁵³ But this rule was held not to apply to a daughter of eleven years who sued on account of a particular intoxication of her father.⁵⁴ In Michigan, though the statute provides absolutely for an action in favor of any person injured in per-

⁴⁸ *Johnson v. Drummond*, 16 Ill. App. 641.

⁴⁹ *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14; *Reed v. Thompson*, 88 id. 245; *Engleken v. Hilger*, 43 Iowa, 563; *Wilson v. Booth*, 57 Mich. 249, 23 N. W. 799; *English v. Beard*, 51 Ind. 489; *Dunlap v. Wagner*, 85 id. 529, 44 Am. Rep. 42.

⁵⁰ *Id.*

⁵¹ *Volans v. Owen*, 74 N. Y. 526; *Mulford v. Clewell*, 21 Ohio St. 191; *Warrick v. Rounds*, 17 Neb. 411, 22 N. W. 785.

⁵² *Fortier v. Moore*, 67 N. H. 460.

⁵³ *Radley v. Seider*, 99 Mich. 431, 58 N. W. 366.

⁵⁴ *Sissing v. Beach*, 99 Mich. 439, 58 N. W. 364.

son, property, means of support or otherwise, it is still an open question, and expressly recognized as such, whether an action will lie against one who lawfully sells to an adult person. All the cases in that state have been judicially referred to as cases where the sale was unlawful because in violation of the statute.⁵⁵ Where an intoxicated person killed another and in consequence was sentenced to the penitentiary, it was held that the wife could recover for loss of support.⁵⁶ Under the Nebraska statute it is held that it is not necessary that the liquor furnished or any resultant intoxication should be the sole or even principal cause of the damages, but that it is sufficient if it contributes to produce the injuries.⁵⁷

§ 698 (375). Where the death of the intoxicated person ensues from the intoxication as proximate cause, it is held in some states, and, logically, as it appears to the writer, to produce within the meaning of the statute a total loss of the means of support which would otherwise — that is, in the absence of the wrongful cause — be derivable from him.⁵⁸

In *Mead v. Stratton*⁵⁹ the court say: "It is evident that the legislature intended to go in such a case far beyond anything known to the common law, and to provide a remedy

⁵⁵ *Bell v. Zelmer*, 75 Mich. 66, 42 N. W. 606. See *Jewett v. Wanshura*, 43 Iowa, 574; *Myers v. Conway*, 55 Iowa, 166, 7 N. W. 481; *Wing v. Benham*, 76 Iowa, 17, 39 N. W. 921; *Myers v. Kirt*, 68 Iowa, 124, 26 N. W. 22; *S. C.*, 64 Iowa, 27, 19 N. W. 846.

⁵⁶ *Beers v. Walhizer*, 43 Hun, 254; *Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154.

⁵⁷ *McClellan v. Hein*, 56 Neb. 600, 77 N. W. 120; *Cornelius v. Hultman*, 44 Neb. 441, 63 N. W. 891; *Sellars v. Foster*, 27 Neb. 118, 42 N. W. 907; *McClay v. Worrall*, 18 Neb. 44, 24 N. W. 429.

⁵⁸ *Mead v. Stratton*, 87 N. Y. 493,

41 Am. Rep. 386; *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236; *Hackett v. Smelsley*, 77 Ill. 109; *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409; *Buckmaster v. McElroy*, 20 Neb. 557, 57 Am. Rep. 843; *Rafferty v. Buckman*, 46 Iowa, 195; *Gardner v. Day*, 95 Me. 558, 50 Atl. 892; *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245; *Smith v. Reynolds*, 8 Hun, 128; *Emory v. Addis*, 71 Ill. 273; *Davis v. Standish*, 26 Hun, 608; *Chmelir v. Sawyer*, 42 Neb. 362, 60 N. W. 547; *Scott v. Chope*, 33 Neb. 41, 49 N. W. 940; *Brockway v. Patterson*, 72 Mich. 122, 40 N. W. 192.

⁵⁹ 87 N. Y. 496, 41 Am. Rep. 386.

for injuries occasioned by one who was instrumental in producing, or who caused, the intoxication. While a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained." Also: "If the injury which had resulted to the deceased in consequence of his intoxication had disabled him for life, or to such an extent as to incapacitate him for labor and for earning a support for his family, it would no doubt be embraced within the meaning and intent of the statute. That death ensued in consequence thereof furnishes much stronger ground for a claim for a loss of means of support; and a different rule in the latter case would make provision for the lesser and temporary injury, while that which was greatest and most serious would be without any remedy or means of redress."

In *Schroder v. Crawford* ⁶⁰ the supreme court of Illinois advance the same view by saying: "It was not the intention that the intoxicating liquor alone, of itself, exclusive of other agency, should do the whole injury. That would fall quite short of the measure of remedy intended to be given. The statute was designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to its natural and obvious meaning. Any fair reading of the enactment must be that in the instances above,⁶¹ as well as the present, the death would have been in consequence of the intoxication within the undoubted intendment of the statute." In accordance with this construction, wherever death or permanent disability occurs as the natural and proximate result of intoxication, as where the intoxicated person lies down and is frozen to death,⁶² or drowned by a freshet, or is run over by a railroad train,⁶³ or is per-

⁶⁰ 94 Ill. 361, 34 Am. Rep. 236.

557, 57 Am. Rep. 843; *McCarty v.*

⁶¹ *Emory v. Addis*, 71 Ill. 273; *Hackett v. Smelsley*, 77 id. 109.

Wells, 51 Hun, 171; *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409.

⁶² *Hackett v. Smelsley*, 77 Ill. 109; *Buckmaster v. McElroy*, 20 Neb.

⁶³ *Rosecrants v. Shoemaker*, 60 Mich. 4, 26 N. W. 794; *Emory v.*

manently injured or killed by other mischance or his own act, owing to his helplessness, frenzy or abnormal condition, in a state of intoxication,⁶⁴ this consequence is deemed within the statute when the complaint is for an injury to means of support. Where an intoxicated person provokes a quarrel and is killed therein, his death is but the remote consequence of the intoxication, and there can be no recovery therefor against the vendor of the liquor.⁶⁵ So where, in trying to avoid the police, he slips down a steep bank which he is trying to climb, falls into an open sewer hole on private property and breaks his neck.⁶⁶

§ 699 (376). A more conservative view has prevailed in some of the states. In *Davis v. Justice*⁶⁷ the supreme court of Ohio say: "Injuries by any intoxicated person, or in consequence of the intoxication, are the terms of the statute; and it is contended that if intoxication causes death, and death causes injury, the latter is within the meaning of the act. On the other hand, it is contended that as the legislature must be presumed to have known the state of the common law, and the extent of the innovation by the act of 1851 [an act requiring compensation for causing death by wrongful act, neglect or default], if a further innovation had been intended, such intention would have been expressed in unmistakable terms. We incline to the latter view. Indeed, when the injury to be compensated consists in the loss of labor, it is at least paradoxical to say that

Addis, 71 Ill. 273. In *Indiana* the death under such circumstances is held too remote an effect to be charged to the person who unlawfully sold the liquor which caused the intoxication. *Collier v. Early*, 54 Ind. 559. The court say: "The death of *Early*, caused by a train of cars, is an effect which is not naturally, necessarily, nor even probably, connected with the fact of unlawfully selling intoxicating liquors to him by the appellant

whereby he became drunk." *Krachs v. Heilman*, 53 Ind. 517.

⁶⁴ *Volans v. Owen*, 74 N. Y. 526; *Blatz v. Rohrbach*, 42 Hun, 402; *Davis v. Standish*, 26 Hun, 608; *Campbell v. Schlesinger*, 48 id. 428.

⁶⁵ *Shugart v. Egan*, 83 Ill. 56. See *Lueken v. People*, 3 Ill. App. 375; *Swinfin v. Lowry*, 37 Minn. 345.

⁶⁶ *Roach v. Kelly*, 194 Pa. St. 24, 44 Atl. 1090.

⁶⁷ 31 Ohio St. 359, 27 Am. Rep. 514.

labor which could not be performed during the life of the laborer is included. And again, in construing the words of the statute applicable to the case before us, it might be said that the action can be maintained only for an injury to means of support of the plaintiff *as wife* of the person intoxicated, and not for an injury sustained by her as his widow. She had an interest in his labor and in his capacity to labor, as a means of support, during his life; but after his death this means of support no longer existed, and was not the subject of injury or diminution.

"But to avoid any charge of hypercriticism, we place our decision upon the ground that in view of the previous state of the law, and the mischief sought to be remedied, we can find no expression in the statute that indicates an intention on the part of the legislature to bring the loss of labor caused by the death of the person intoxicated within the meaning of the term 'means of support,' for an injury to which the right of action is given by the statute."⁶⁸ The same view prevails in Massachusetts.⁶⁹ In Indiana the loss of "means of support," where death has occurred to a person in a drunken, insensible state in consequence of a train of cars striking him,⁷⁰ or being crushed or fatally injured by a barrel of salt in the wagon in which he was laid to be carried by a drunken associate,⁷¹ has been denied, not on the ground of legislative intention excluding the right to recover in case of death, but on the common-law principle that the loss of support is too remote a consequence of the wrongful cause mentioned in the statute. Worden, C. J., said: "We have seen that, if the plaintiff is entitled to recover, it is because she was injured 'in consequence of the intoxication' of the deceased. The immediate cause of the injury to the plaintiff was the death of the deceased. The remote cause may have been his intoxication, which led to

⁶⁸ *Kirchner v. Myers*, 35 Ohio St. 85, 35 Am. Rep. 598.

⁶⁹ *Barrett v. Dolan*, 130 Mass. 366,

39 Am. Rep. 456; *Harrington v. McKillop*, 132 Mass. 567.

⁷⁰ *Collier v. Early*, 54 Ind. 559.

⁷¹ *Krach v. Heilman*, 53 Ind. 517.

his injuries, which injuries, in their turn, led to his death. The plaintiff, therefore, was not immediately injured by the intoxication of the deceased.”⁷² In *Collier v. Early*,⁷³ Biddle, J., said: “The death had not taken place immediately and directly upon the cause; but it must be effected by a chain of natural effects and causes, unchanged by human action, or the party who committed the first act will not be responsible.”⁷⁴ The authority of these utterances has been very much shaken by a later case.⁷⁵

§ 700 (377). In separate actions against one of the many persons whose sales to a drunkard have contributed to a particular intoxication or to a besotted condition, the measure of the defendant’s individual responsibility has sometimes been a subject of consideration. The question has been whether one of a number who has so contributed, by separate and distinct sales, made without concert or agreement with the others, can be held liable for all the damage which has resulted, or for that part only which his own acts have caused. The common-law principle is that one is not liable for the whole damage done by several unless the wrong was done with such concert that all are jointly liable, and they are not jointly liable unless they did the wrongful act jointly, or unless it was done by their preconcert or was subsequently jointly ratified and adopted.⁷⁶ This rule seems to have been relaxed and departed from in *Boyd v. Watt*, to facilitate the remedy.⁷⁷ The supreme court of Ohio say in that case: “If, as seems to be claimed, a defendant can only be liable, except in cases of conspiracy or agreement, when he is the *sole* cause of the habitual intoxication, and no recovery can be had unless the damages can be separated

⁷² *Id.*

⁷³ 54 Ind. 559.

⁷⁴ *Backes v. Dant*, 55 Ind. 181.

⁷⁵ *Dunlap v. Wagner*, 85 Ind. 529,
44 Am. Rep. 42.

⁷⁶ 1 Suth. on Dam. 211–216, and
cases cited; *Lull v. Fox*, etc. Im-

provement Co., 19 Wis. 100; *La France v. Krayner*, 42 Iowa, 143; *Little Schuylkill Nav. Co. v. Richards*, 57 Pa. St. 142; *Bard v. Yohn*, 26 Pa. St. 482; *Stone v. Dickinson*, 5 Allen, 59, 81 Am. Dec. 727.

⁷⁷ 27 Ohio St. 259.

(an impossibility in most cases of this class), then this part of the statute is virtually a dead-letter. Why should the defendant be exonerated from the injury he has caused by his habitual wrongs for a series of years by showing that others, without his knowledge, have also contributed by like means to this result? He was using adequate means to produce the result, and may therefore fairly be presumed to have intended it. True, he may not have enjoyed a monopoly in the profits accruing, by reason of the competition of others in a common business; but that certainly is no reason why he should not be liable for the injuries he was intentionally engaged in causing. If such is the law, then he could take advantage of his own wrong by showing that during these four years another or others have contributed." In such a case it is held in Iowa that the wrong is not joint; that several contributing separately cannot be sued together, nor when sued separately the whole damage recovered. Each is liable only for his own act; a recovery against or a release of another is no defense.⁷⁸

In *La France v. Kray*⁷⁹ the court say: "A joint liability arises when an immediate act is done by the co-operation or joint act of two or more persons. Mere successive wrongs, being the independent acts of the persons doing them, will not create a joint liability, although the wrongs may be committed against the same person. There must be concurrent action, co-operation or a consent or approval in the accomplishment by the wrong-doers of the particular wrong, in order to make them jointly liable." But the court was careful to say: "But we are not to be understood as denying a joint liability in cases where the successive

⁷⁸ *La France v. Kray*, 42 Iowa, 143; *Flint v. Gauer*, 66 Iowa, 696, 24 N. W. 513; *Richmond v. Shickler*, 57 Iowa, 486, 10 N. W. 882; *Ennis v. Shiley*, 47 Iowa, 552; *Hitchner v. Ehlers*, 44 Iowa, 40; *Ward v. Thompson*, 48 Iowa, 588; *Engleken v. Webber*, 47 Iowa, 558; *Jewett v.*

Wanshura, 43 Iowa, 574; *Woolheather v. Risley*, 38 Iowa, 486; *Jackson v. Noble*, 54 Iowa, 641, 7 N. W. 88; *Kearney v. Fitzgerald*, 43 Iowa, 580; *Huggins v. Kavanagh*, 52 Iowa, 368, 3 N. W. 409.

⁷⁹ 42 Iowa, 143, 145.

sales by several have produced a particular intoxication from which the injury sued for has resulted." Accordingly, in a case which came before it the following year,⁸⁰ the same court used this language: "If a dozen saloonkeepers should each sell a drink of whisky to a party, from the combined effect of which he should become intoxicated, and should beat another or destroy his property, the law has no means of determining the exact amount of the injury which is chargeable to each. Under such circumstances we have no doubt they are *joint wrong-doers, and that each is liable for the injury done by all*. They could all be sued together, or one, or any number of them, separately. But there could be but one satisfaction for the injury."⁸¹ But where the

⁸⁰ *Kearney v. Fitzgerald*, 43 Iowa, 580, 583. And in *Faivre v. Mandercheid*, 117 Iowa, 724, 90 N. W. 76, it was held that, where damages are claimed for a particular intoxication, all who contribute are jointly liable. To same effect, *Jewell v. Welch*, 117 Mich. 65, 75 N. W. 283.

⁸¹ Under the Nebraska statute it has been held in that state that an action can be maintained by the widow and infant children, jointly or severally, whose husband and father has lost his life in consequence of intoxication, against any and all persons, jointly or severally, who sold, gave or furnished any intoxicating liquors which were drank by him on the day or about the time of such intoxication. *Kerkow v. Bauer*, 15 Neb. 150. The following are the important sections of the Nebraska act, in chapter 50, Revised Statutes: "Sec. 11. All persons who shall sell or give away, upon any pretext, malt, spirituous or vinous liquors, or any intoxicating drinks,

without having first complied with the provisions of this act, and obtained a license as herein set forth, . . . shall be liable in all respects to the public and to individuals the same as he would have been had he given bonds and obtained license as herein provided.

"Sec. 15. The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; he shall support all paupers, widows and orphans and the expenses of all civil and criminal prosecutions growing out of or justly attributable to the traffic in intoxicating drinks, etc.

"Sec. 16. It shall be lawful for any married woman or any other person at her request to institute and maintain in her own name a suit on any such bond for all damages sustained by herself and children on account of such traffic, etc.

"Sec. 18. On the trial of any suit under the provisions hereof, the cause or foundation of which shall

statute provides for an action and authorizes a recovery against any person who by selling or furnishing the intoxicating drink causes "in whole or in part" the intoxication, habitual or otherwise, there is no apportionment of damages; full recovery is allowed against any one who contributed to the statutory wrong.⁸²

be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary, to sustain the action, to prove that the defendant or defendants sold or gave liquor to the person so intoxicated or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received," etc. As to the scope or facility of redress under this legislation, the court in *Kearney v. Fitzgerald*, 43 Iowa, 580, say: "We cannot apply the common-law rules of pleading to this case. While the law provides for licensing the sale of intoxicating liquors, it regards the making of a person intoxicated, or the selling or furnishing a person intoxicating liquors with which he makes himself intoxicated, as a tort or wrong, and holds such person so selling or furnishing responsible for certain of the consequences of such intoxication. And to provide against the difficulty, or rather impossibility, of proving whether it was the first, middle or last drink that caused the intoxication, the statute provides that in such cases 'it shall only be necessary, to sustain the action, to prove that the defendant or defendants sold or gave liquor to the person so intoxicated or under the

influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received.' While this statute does not in terms state what it will be necessary to plead or allege in such case, yet when we consider the object and office of pleading, we must regard the provision of the section as applying as well to the pleading as to the proof. If I am correct in this view, then it made no difference that each of the defendants was doing business for and by himself, and sold each his separate glass of liquor to the deceased as his individual act in which the other two defendants had no interest. While the act of each defendant in selling the liquor was his own individual act, yet the law makes them in certain contingencies jointly interested in and responsible for the intoxication caused thereby. And it was only necessary to allege and prove the fact of selling or furnishing intoxicating liquors by the defendants to the deceased on or about the day of his intoxication."

⁸² *Neuerberg v. Gault*, 4 Ill. App. 348; *Bryant v. Tidgewill*, 133 Mass. 86; *Werner v. Edmiston*, 24 Kan. 147; *O'Leary v. Frisbey*, 17 Ill. App. 553; *Rantz v. Barnes*, 40 Ohio St. 43; *Aldrich v. Parnell*, 147

§ 701. **Selling liquor to minors.**—Statutes forbidding the sale of liquor to minors are common.⁸³ Some courts hold that an honest and well founded belief that the minor was of lawful age is a good defense to a prosecution under the statute.⁸⁴ Other courts hold that such a belief is no defense and that the vendor must ascertain at his peril whether the person to whom he sells is a minor.⁸⁵ Where the statute made it unlawful to sell, furnish or give liquor to a minor, a saloon-keeper who allows an adult to treat a minor in his saloon is guilty of *furnishing* liquor to the minor within the statute.⁸⁶ In such a case the saloon-keeper has also been held to *deal* or *traffic* in liquor with the minor.⁸⁷ But such a transaction is held not to be a sale or gift to the

Mass. 409, 18 N. E. 170. In the Michigan statute this liability is not declared in terms to attach to any person who causes the intoxication "in whole or in part," but the same rule is applied. Graves, J., speaking for the court in *Steele v. Thompson*, 42 Mich. 596, 4 N. W. 536, said: "The question is one of construction; and whatever opinion may have been formed in other states of provisions having some resemblance to ours, we must attend to the sense and spirit of our own enactments and judge accordingly. Now the statute we are considering proceeds upon the idea that there has been an injury which the defendant by some of the means indicated has contributed to produce, and that he shall be liable for the whole injury and not merely for such portion as a jury, if able to agree upon any scale of apportionment, may assign as his actual share or quota. . . . And besides being a natural interpretation, and one which accords

with the apparent policy of the legislation, it has the merit of relieving the remedy of much complication and embarrassment." See *Kearney v. Fitzgerald*, 43 Iowa, 580. Where one was on a debauch from July 23 to Aug 9, it was held that all who sold him liquor during that period were jointly liable. *Johnson v. Johnson*, 100 Mich. 326, 58 N. W. 1115.

⁸³ For a treatment of the subject see *Black on Intoxicating Liquors*, §§ 415-422.

⁸⁴ *Adler v. State*, 55 Ala. 16; *Robinius v. State*, 63 Ind. 235; *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374.

⁸⁵ *Redmond v. State*, 36 Ark. 58, 38 Am. Rep. 24; *McCutcheon v. People*, 69 Ill. 601; *Farmer v. People*, 77 Ill. 322; *In re Carlson*, 127 Pa. St. 330, 18 Atl. 8.

⁸⁶ *People v. Neumann*, 85 Mich. 98, 48 N. W. 290.

⁸⁷ *Nelson v. State*, 111 Wis. 394, 87 N. W. 235, 87 Am. St. Rep. 881.

minor.⁸⁸ Where a minor expressly buys liquor for an adult, pays for it with the adult's money and delivers it to him, it is not a sale to the minor.⁸⁹ Where sales on the written order of the parent, guardian or family physician were excepted, it was held that a general order from a parent to sell or give his son from day to day and at all times as much liquor as he wanted was not such an order as the statute contemplated.⁹⁰ An act forbidding the sale of liquor to minors provided that a sale by an agent should be deemed and taken to be the act of his master. It was held that a sale by an agent was not conclusive, but only *prima facie* evidence of a sale by the master, and that it would be a good defense that the master had in good faith forbidden such sales.⁹¹

§ 702 (424). **Statutes of limitations.**—In several cases where suit has been brought within the period of the statute of limitations and has abated by death or marriage of one of the parties after the expiration of that period, a new suit commenced within a reasonable time by the party to or against whom the action survived has been maintained unaffected by the statute, though it contained no saving for such a case.⁹²

⁸⁸ Siegel v. People, 106 Ill. 89.

⁸⁹ Monaghan v. State, 66 Miss. 513, 6 So. 241, 4 L. R. A. 800; State v. McLain, 49 Mo. App. 398.

⁹⁰ Connolly v. People, 42 Ill. App. 36. But a general order was held sufficient in Maschwitz v. State, 49 Ark. 171, 4 S. W. 656.

⁹¹ State v. McCance, 110 Mo. 398, 19 S. W. 648.

⁹² In Hodsdon v. Harridge, 2 Williams' Saunders, 64a, the suit abated by the marriage of the plaintiff, a female, and it was argued in support of the bar of the statute that the suit abated by the voluntary act of the plaintiff, and therefore she was not within the equity of

the statute; but the court affirmed the right to bring the said action within two terms. See Durnford's note (a) to Carver v. James, Willes, 257. "By the statute of 21 Jac. 1, c. 16, § 4, it was provided that 'in all cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, on such judgment given against the plaintiff or outlawry reversed, and not after.' Within the equity of that section the courts have allowed an executor or administrator, within a year after testator's or intestate's death,

The nineteenth section of 4 and 5 Anne, chapter 16, provides that if any person or persons against whom a cause of action existed, or any of them, were beyond the seas, the statute of limitations should not commence to run until their return. Where one joint contractor died abroad, it was held that the statute did not begin to run until his death, and that, within six years from his death, an action might be brought against his co-contractors; for though such a case was not within the literal words of the section, it was within their equity.⁹³ It has also been held that where a defendant has pleaded a partnership in abatement

to renew a suit commenced by the testator or intestate. *Gargrave v. Every*, 1 Lutw. C. P. 260; *Willcox v. Huggins*, Fitz. 172, 290; 2 Str. 907. And in *Lithbridge v. Chapman*, 15 Vin. Abr. 103, and cited in *Willcox v. Huggins*, that indulgence was extended to fourteen months after the intestate's death. So if there be any delay in granting administration on account of any suit respecting the will, the time may be extended. 2 Strange, 907. No precise time, indeed, appears to have been fixed. But in that case Fitz Lee, J., said: 'I think it should be in the nature of journeys accounts, which is a taking up and pursuing of the old action in a reasonable time, which is to be discussed by the discretion of the justices. *Spencer's Case*, 6 Coke, 9b. And by the same rule, I think, what is or is not a recent prosecution in a case of this nature is to be determined by the discretion of the court from the circumstances of the case; but generally the year in the statute is a good direction.' Where an act of parliament for dividing and allotting lands directed all disputed

claims to be tried by a feigned issue, and limited the time for bringing such actions to six months, it was holden that an action brought within the time, but which abated by the death of the defendant, must be revived against the heir within six months afterwards. *Knight v. Bate*, 2 Cowp. 738." *Crosier v. Tomlinson*, 2 Mod. 71; *Chandler v. Villett*, 2 Saund. 120; *Matthews v. Phillips*, 2 Salk. 424; *Piggott v. Rush*, 4 Ad. & El. 912; *Curlewis v. Mornington*, 7 El. & B. 283; *Kinsey v. Heyward*, 1 Lord Raym. 434; *Hunter v. Glenn*, 1 Bailey, 542; *Parker v. Fassit*, 1 Har. & J. 337; *Allen v. Roundtree*, 1 Spears, 80; *Martin v. Archer*, 3 Hill (S. C.), 211; *Angell on Lim.* 325-330; *Huntington v. Brinkerhoff*, 10 Wend. 278.

⁹³ *Towns v. Mead*, 16 C. B. 123, 134, 141. See *Townsend v. Deacon*, 3 Ex. 706; *Forbes v. Smith*, 11 id. 161. The charter of a commercial corporation restrained the making of debts owing at the same time, exceeding three times the amount of stock paid in, and provided that the directors should be personally liable for the excess, as well as the

and the plaintiff commenced a new suit within a year and a day after the first writ was quashed, the bar of the statute did not apply; that the statute did not run after the commencement of the original action.⁹⁴ These decisions seem to proceed upon the cases interpreting old English statutes by their equity. There may be reason in England for adhering to the early decisions while the same statute continues in force, and in any other jurisdiction adopting the same statute, and therefore, presumably, adopting it with the home construction. Crompton, J., said: "I look upon the construction of old statutes as law not to be interfered with; it has been acted upon, and the legislature have taken it for granted. We are therefore to abide by the old decisions."⁹⁵ But it is held to be no answer to the plea of the statute of limitations that after a cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that by reason of litigation as to the right of probate an executor of his will was not appointed until the expiration of the six years, and that the plaintiff sued the executor within a reasonable time after probate granted.⁹⁶ The death of the party to or against

company. On the question whether such a liability of the directors came within the six months' limitations for bringing actions for penalties, fines and forfeitures, it was held that the statute was not penal, but remedial; therefore it was not within that provision of the statute of limitations. *Neal v. Moultrie*, 12 Ga. 104.

⁹⁴ *Downing v. Lindsay*, 2 Pa. St. 382.

⁹⁵ *Curlew v. Mornington*, 7 El. & B. 283. This is well illustrated by the interpretation given in this country of the borrowed phrase "beyond the seas" — out of the state: *Murray v. Baker*, 3 Wheat. 541, 4 L. Ed. 454; *Forbe v. Foot*, 2 McCord,

331; *Shelby v. Guy*, 11 Wheat. 361, 6 L. Ed. 495; *Bank of Alexandria v. Dyer*, 14 Pet. 141, 10 L. Ed. 391; *Pancoast v. Addison*, 1 H. & J. 350, 2 Am. Dec. 520; *Wakefield v. Smart*, 8 Ark. 488; *Denham v. Holeman*, 26 Ga. 182; *Stephenson v. Doe*, 8 Blackf. 508; *Galusha v. Cobleigh*, 13 N. H. 79; *Richardson v. Richardson*, 6 Ohio, 125, 25 Am. Dec. 745; *West v. Pickesimer*, 7 Ohio, 235. Or out of the United States: *Mason v. Johnson*, 24 Ill. 159, 76 Am. Dec. 740; *Marvin v. Bates*, 13 Mo. 217; *Fackler v. Fackler*, 14 id. 431; *Keeton v. Keeton*, 20 id. 530; *Gonder v. Eastbrook*, 33 Pa. St. 374.

⁹⁶ *Rhodes v. Smethurst*, 4 M. & W. 42.

whom an action has accrued will not suspend the statute;⁹⁷ not even if the heir or devisee be under a disability will the running of the statute in such case be arrested.⁹⁸

§ 703 (425). Where a statute limited the time for suing, but gave a further period to persons abroad, after they returned, it was construed as giving that additional time to the executor of a person who never returned but died abroad.⁹⁹ A Vermont statute of limitations provided that when any suit shall fail by reversal, on writ of error, motion in arrest of judgment, plea in abatement or on demurrer, and "the merits of the cause shall not be tried," the plaintiff may, from time to time, commence another suit within one year after such judgment reversed, etc. In *Phelps v. Wood*¹ the court, by Redfield, J., said: "It is evident this exception, or proviso of the statute, was intended to reach all those cases where a suit was brought and the merits of the action failed to be tried, without the fault of the plaintiff, and the period of limitation had become complete during the pendency of the suit. So that the present suit is clearly within the equity of the proviso, although not strictly within its terms. It may be said, too, that should a suit be abated, without a plea, but on motion, as may sometimes be done, the case would not come within the exception. The same is true where the plaintiff is compelled by some error in pleading, variance, or otherwise, to become nonsuit, without his own fault. And no doubt these and many other cases, not coming technically within the terms of the proviso, would still be held to come within its equity."² If the cause of action accrues after

⁹⁷ *Daniel v. Day*, 51 Ala. 431.

⁹⁸ *Meeks v. Vassault*, 3 Saw. 206, Fed. Cas. No. 9393.

⁹⁹ *Townsend v. Deacon*, 3 Ex. 706; *Forbes v. Smith*, 11 id. 161.

¹ 9 Vt. 399.

² This case sanctions a latitudinarian construction to except cases on the equity of the statute, and is

not in harmony with the general current of authority of that state in that regard. The learned judge gives several analogous instances from the reports. He puts them on the ground that the statute of limitations is founded on an arbitrary presumption of payment. "These cases," he says, "are all decided

the intestate's death it has been considered in some cases as existing only from the time there was some one capable of suing, and hence that the statute commences to run only from the grant of administration.³

§ 704 (426). The statute of James I. was "worded very loosely;"⁴ and its beneficial operation during the long period it has been in force has been ascribed to its liberal interpretation.⁵ Mr. Wood in his valuable work on limitations thus succinctly epitomizes some instances of that liberal construction: "Although there is no express mention of the action of *assumpsit*, which was at the period of its enactment the most important of all actions, yet as it was clear

upon the principle of regarding the spirit and intent of the statute rather than a strict interpretation of its terms. We are inclined to adopt the same doctrine here, because we think it just and well warranted by decided cases in reference to this subject. As a general rule I should be averse to adopting such a rule of construction, as being unsafe and unsatisfactory. But statutes of limitation regard the remedy, and, being founded upon an arbitrary ground of presumption, require to be liberally expounded to prevent injustice."

Tynan v. Walker, 35 Cal. 634, contains a strong protest, well supported by authority, against implied exceptions to the statute of limitations on the theory that the cases were within the reason of the exceptions for which the statute itself provided; the allowance of such exceptions "overturn," says Sanderson, J., "the maxim that courts are authorized to declare the law only, and not to make it. If they may add at all to the excep-

tions provided for in the statute, under the pretense that the case before them is of equal equity with those given in the statutes, who is to fix the limit of their interpolations, or establish the line between legislative and judicial functions? If they may add one to the list of excepted cases, by parity of reason they may add another, and so on until the entire body of the statute has become emasculated, and the will of the judiciary substituted for that of the legislature. How much more in keeping with the legitimate exercise of judicial functions are those cases where it has been held that the courts can create no exceptions where the legislature has made none."

³ Fishwick v. Sewell, 4 H. & J. 399; Geiger v. Brown, 4 McCord, 423; Aritt v. Elmore, 2 Bailey, 595; Clark v. Hardiman, 2 Leigh, 347. See Tynan v. Walker, 35 Cal. 634.

⁴ Parke, B., in Inglis v. Haigh, 8 M. & W. 769; Wood on Stat. Lim., § 16.

⁵ Wood on Limitations, sec. 16.

that this omission was unintentional,⁶ it was construed as embracing that action by fair intendment, and as coming within the reason of the statute, and also as coming under the head of trespass on the case.⁷ So, too, although the saving clause in cases of disability does not in terms mention any actions on the case except actions on the case for words, yet it has always been construed as extending to all actions on the case from the manifest inconvenience of a contrary construction."⁸ The general rule is, undoubtedly, that the statute of limitation begins to run against a party immediately upon the accrual of the right of action, and continues to run, unless he was then under a disability mentioned in it, or its running is prevented or arrested by some fact specified for that effect in the statute.⁹

§ 705 (427). Where the legislature has made no exception the courts of justice can make none, as this would be legislating.¹⁰ The insolvency of the defendant or the plaintiff's

⁶ Denman, C. J., in *Pigott v. Rush*, 4 A. & E. 912.

⁷ *Harris v. Saunders*, 4 B. & C. 411; *Bac. Abr.*, title Limitations, E. 1.; *Leigh v. Thornton*, 1 B. & Ald. 625; *Beatty v. Burnes*, 8 Cranch, 98, 3 L. Ed. 500; *Chandler v. Villett*, 2 Saund. 120; *Haven v. Foster*, 9 Pick. 112, 19 Am. Dec. 353; *Crosier v. Tomlinson*, 2 Mod. 71; *Baldro v. Tolmie*, 1 Ora. 176; *Williams v. Williams*, 5 Ohio, 444; *Maltby v. Cooper*, *Morris* (Iowa), 59.

⁸ Wood on St. of Lim., sec. 16.

⁹ *Wells v. Child*, 12 Allen, 333; *The Sam Slick*, 2 Curt. 480, Fed. Cas. No. 12,282; *Harrison v. Harrison*, 39 Ala. 439; *Dozier v. Ellis*, 28 Miss. 730; *Barnes v. Williams*, 3 Ired. L. 481; *Warfield v. Fox*, 53 Pa. St. 382; *Bucklin v. Ford*, 5 Barb. 393; *Sacia v. De Graaf*, 1 Cow. 356; *Pryor v. Ryburn*, 16 Ark. 671; *Favorite v. Booher*, 17 Ohio St. 548; *Howell v. Hair*, 15 Ala.

194; *Conover v. Wright*, 6 N. J. Eq. 613, 47 Am. Dec. 213; *Clark v. Richardson*, 15 N. J. L. 347; *De Kay v. Darrah*, 14 id. 288; *Thorpe v. Corwin*, 20 id. 311; *Pinckney v. Burrage*, 31 id. 21; *Kistler v. Hereth*, 75 Ind. 177; *Parsons v. McCracken*, 9 Leigh, 495; *Rogers v. Hillhouse*, 3 Conn. 398; *Barker v. Millard*, 16 Wend. 572; *Sands v. Campbell*, 31 N. Y. 345. In North Carolina it was held in *Vance v. Grainger*, Conf. 71, that where the evidence of debt sued on had been detained in the hands of a master by order of a court of equity, the statute was meantime suspended.

¹⁰ *Bank v. Dalton*, 9 How. 522, 13 L. Ed. 242; *McIver v. Ragan*, 2 Wheat. 29, 4 L. Ed. 175; *Troup v. Smith*, 20 John. 33; *Callis v. Waddy*, 2 Munf. 511; *Hamilton v. Smith*, 3 Murphy, 115; *Swaney v. Gage* County, 64 Neb. 627, 90 N. W. 542;

want of means to prosecute a suit, or his bankruptcy, will not suspend or prevent the running of the statute.¹¹ But one implied exception has been extensively recognized, namely, that the statute does not run during a period of civil war as to matters of controversy between citizens of the opposing belligerents.¹²

§ 706. Acts changing the period of limitation.—A debtor has no vested right in the statute of limitations and, as to claims not already barred, the limit may be removed altogether or the period extended at the pleasure of the legislature.¹³ As to existing rights and causes of action the period of limitation may be shortened, provided a reasonable time is given in which to enforce them.¹⁴ A cause of

Madden v. Lancaster County, 65 Fed. 188, 12 C. C. A. 566, 27 U. S. App. 528.

¹¹ Mason v. Crosby, Davies, 303; Harwell v. Steel, 17 Ala. 372.

¹² Wood on St. Lim., § 6; § 544, ante.

¹³ Ryans v. Boogher, 169 Mo. 673, 69 S. W. 1043; Bird v. Selley, 113 Mo. 580, 21 S. W. 91; Voight v. Gulf, etc. Ry. Co., 94 Tex. 357, 60 S. W. 658; Bradley v. Norris, 63 Minn. 156, 65 N. W. 357.

¹⁴ Rankin v. Schofield, 70 Ark. 83, 66 S. W. 197; Tuttle v. Block, 104 Cal. 443, 38 Pac. 108; Peluson v. Emmerson, 135 Ill. 55, 25 N. E. 842; Cassady v. Grimmelman, 108 Iowa, 695, 77 N. W. 1067; Morris v. Tripp, 111 Iowa, 115, 82 N. W. 610; Sanford v. Hampden Paint & C. Co., 179 Mass. 10, 60 N. E. 399; McKisson v. Davenport, 83 Mich. 211, 47 N. W. 100; State v. Messenger, 27 Minn. 119, 6 N. W. 457; Hill v. Townley, 45 Minn. 167, 47 N. W. 653; Russell v. Akeley Lumber Co., 45 Minn. 376, 48 N. W. 3; Cranor v. School District, 151 Mo. 119, 52 S. W. 232;

Kreyling v. O'Reilly, 97 Mo. App. 384, 71 S. W. 372; Kennedy v. Adams, 24 Nev. 217, 51 Pac. 840; Parmenter v. New York, 135 N. Y. 154, 31 N. E. 1035; Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; Reid v. Supervisors, 60 Hun, 215, 14 N. Y. S. 594; Nichols v. Norfolk, etc. R. R. Co., 120 N. C. 495, 26 S. E. 643; Culbreth v. Downing, 121 N. C. 205, 28 S. E. 294, 66 Am. St. Rep. 661; Merchants' National Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653; Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715; Rodenbaugh v. Philadelphia Traction Co., 190 Pa. St. 358, 42 Atl. 953; King v. Belcher, 30 S. C. 381, 9 S. E. 359; Chester & Cheraw R. R. Co. v. Marshall, 40 S. C. 59, 18 S. E. 247; Link v. Houston, 94 Tex. 378, 59 S. W. 566; McQuesten v. Morrell, 12 Wash. 335, 41 Pac. 56; Pinkum v. Eau Claire, 81 Wis. 301, 51 N. W. 550; Lawton v. Waite, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616; Relyea v. Tomahawk Paper & Pulp Co.,

action, unless founded solely upon a statute, is a vested right which cannot be destroyed by limiting a time for its enforcement that has already expired.¹⁵ As a result of these rules a statute shortening the period of limitations will be held not to apply to existing causes of action, which, by its terms, would be already barred or would not have a reasonable time for their enforcement.¹⁶ The supreme court of Massachusetts says: "Whenever the time within which the right to enforce a liability is shortened by statute, the uniform construction is to hold it not applicable where the result would be to deprive one of the right to enforce a claim without a reasonable time to act before being barred."¹⁷ The question of reasonable time is primarily for the legislature and, where a time is expressly fixed or allowed for the enforcement of existing rights, the statute is *prima facie* reasonable and will be sustained, unless there is a clear abuse of legislative discretion and disregard of constitutional rights.¹⁸ The supreme court of Minnesota says: "Such statutes must allow a reasonable time after they are passed for the commencement of suits upon existing causes of action, but what is a reasonable time must depend upon the sound discretion of the legislature, considering the nature of the

102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878.

¹⁵ Rankin v. Schofield, 70 Ark. 83, 66 S. W. 197; Cassady v. Grimmelman, 108 Iowa, 695, 77 N. W. 1067; Sanford v. Hampden Paint & C. Co., 179 Mass. 10, 60 N. E. 399; King v. Belcher, 30 S. C. 381, 9 S. E. 359; Chester & Cheraw R. R. Co. v. Marshall, 40 S. C. 59, 18 S. E. 247; Pinkum v. Eau Claire, 81 Wis. 301, 51 N. W. 550.

¹⁶ Rankin v. Schofield, 70 Ark. 83, 66 S. W. 197; Cassady v. Grimmelman, 108 Iowa, 695, 77 N. W. 1067; Norris v. Tripp, 111 Iowa, 115, 82 N. W. 610; McKisson v. Davenport, 83

Mich. 211, 47 N. W. 100; Cranor v. School District, 151 Mo. 119, 52 S. W. 232; Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; Nichols v. Norfolk, etc. R. R. Co., 120 N. C. 495, 26 S. E. 643; Culbreth v. Downing, 131 N. C. 205, 28 S. E. 294, 66 Am. St. Rep. 661; King v. Belcher, 30 S. C. 381, 9 S. E. 359; Relyea v. Tomahawk Paper & Pulp Co., 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 872.

¹⁷ Sanford v. Hampden Paint & C. Co., 179 Mass. 10, 14, 60 N. E. 399.

¹⁸ Relyea v. Tomahawk Paper & Pulp Co., 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878.

subject and the purposes of the enactment; 'and the courts will not inquire into the wisdom of the exercise of this discretion by the legislature in fixing the period of legal bar, unless the time allowed is manifestly so short as to amount to a practical denial of justice.'"¹⁹ Various periods from six months to two years have been held reasonable.²⁰ When there is no express provision for existing causes of action, the general rule established by the authorities appears to be that the question of reasonable time is one to be determined by the court in each particular case.²¹ A Wisconsin act provided that no action for personal injuries should be maintained unless a certain notice was given within one year from the happening of the injury. This in effect barred an action in one year unless the notice was given. The statute was held not to apply to a case where but sixty-one days remained after the passage of the act in which to give notice and the plaintiff was a minor during that period.²² If the court determines in a particular case that a reasonable

¹⁹ *State v. Messenger*, 27 Minn. 119, 6 N. W. 457; *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653. In *Gilbert v. Ackerman*, 159 N. Y. 118, 124, 53 N. E. 753, 45 L. R. A. 118, the court says: "The question of reasonableness, naturally and primarily, is with the legislature; and when the question is brought before the courts, the surrounding circumstances are regarded in determining whether the legislature in prescribing a period of limitation has erred to the prejudice of substantial rights. The right possessed by a person of enforcing his claim against another is property, and if a statute of limitations, acting upon that right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be de-

prived of property without due process of law."

²⁰ *Tuttle v. Block*, 104 Cal. 443, 38 Pac. 108; *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653; *Russell v. Akeley-Lumber Co.*, 45 Minn. 376, 48 N. W. 3; *Wrightman v. Boone County*, 82 Fed. 412; *Kreyling v. O'Reilly*, 97 Mo. App. 384, 71 S. W. 372.

²¹ *Link v. Houston*, 94 Tex. 378, 59 S. W. 566; *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56; *Relyea v. Tomahawk Paper & Pulp Co.*, 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878.

²² *Relyea v. Tomahawk Paper & Pulp Co.*, 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878. The court says: "A law changing the time for, or conditions of, the enforcement of a common-law right, is in the nature of a statute of limita-

time is not given by the new law, or if no time is given, then the former law is held to apply,²³ though if the former law is expressly repealed, there would seem to be no limitation applicable to such a case.²⁴

§ 707. *Same.*—In North Carolina the following rule has been laid down: "The legislature may change the remedy and the statute of limitations, which applies to the remedy, by extending or shortening the time, provided in the latter case a reasonable time is given for the commencement of an action before the statute works a bar. . . . This rule leaves open the question in each case, what is a reasonable time, and that is objectionable because it is attended with uncer-

tions, which, if of such a character as to materially affect the right itself, is within the inhibition of the constitution in regard to the passage of laws impairing the obligation of contracts or taking property without due process of law. A change in the law as to the time of enforcing existing rights, or imposing a new condition of such enforcement, which does not allow a reasonable time within which to commence an action for such enforcement or comply with the new condition, is within the inhibition mentioned and is void as to such existing rights, otherwise valid. If a time be specified in the statute of limitations for the commencement of an action to enforce existing rights, or to comply with the new conditions specified therein, showing that the legislature exercised its judgment in the matter, it is not within the jurisdiction of courts to examine the question of the proper exercise of such power, in the absence of a clear abuse of legislative discretion and disregard of constitutional rights. When the

new act of limitations does not provide for existing causes of action, yet uses general language applicable to all actions, there being nothing in the act, and no other law, making any exception to its application, it applies to all causes of action, subject to the judgment of the court, as to each such case, whether the person affected had a reasonable time after its enactment to comply therewith. . . . What is a reasonable time for the enforcement of existing rights regardless of new conditions of limitation must necessarily vary according to the character of such rights and the class of persons affected and many other circumstances." pp. 306-308.

²³ Rankin v. Schofield, 70 Ark. 83, 66 S. W. 197; Norris v. Tripp, 111 Iowa, 115, 82 N. W. 610; Thoeni v. Dubuque, 115 Iowa, 482, 88 N. W. 967; Cranor v. School District, 151 Mo. 119, 52 S. W. 232.

²⁴ See Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715.

tainty in the minds of litigants and the profession. We therefore hold that a reasonable time shall be the balance of the time unexpired according to the law as it stood when the amending act is passed, provided it shall never exceed the time allowed by the new statute. . . . This rule is reasonable and just, as neither party will be deprived of such remedy as he had when the cause of action arose, and neither should take any advantage by the amending act.”²⁵ According to the weight of authority the period between the passage of the act and its going into effect may be considered in determining the question of reasonable time.²⁶ The period between the passage and the going into effect of an act may itself be a reasonable time for the enforcement of existing causes of action, and it has been so held of intervals of six months to one year.²⁷ Limitation laws like other laws will be construed as prospective unless there is a clear indication of intent to the contrary.²⁸ Some courts

²⁵ *Culbreth v. Downing*, 121 N. C. 205, 28 S. E. 294, 66 Am. St. Rep. 661.

²⁶ *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653; *Russell v. Akeley Lumber Co.*, 45 Minn. 376, 48 N. W. 3; *Merchants' National Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653; *Holcomb v. Tracy*, 2 Minn. 241; *Stine v. Bennett*, 13 Minn. 153; *Duncan v. Cobb*, 32 Minn. 460; *Hart v. Bostwick*, 14 Fla. 180; *Pierce v. Toley*, 5 Met. 168; *Smith v. Morrison*, 22 Pick. 430; *Bigelow v. Bemis*, 2 Allen, 496; *State v. Jones*, 21 Md. 432; *Hedges v. Renaker*, 3 Met. (Ky.) 258; *Kern v. Browne*, 64 Pa. St. 55; *Clay v. Iseminger*, 187 Pa. St. 108, 41 Atl. 38; *Eaton v. Supervisors*, 40 Wis. 668. But some cases hold that there must be a reasonable time after the act goes into effect, and that it is not enough that there is

such reasonable time between the passage and taking effect of the act. *Gilbert v. Ackerman*, 159 N. Y. 118, 53 N. E. 753; 45 L. R. A. 118; *Parmenter v. New York*, 135 N. Y. 154, 31 N. E. 1035; *Price v. Hopkin*, 13 Mich. 318.

²⁷ *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653; *Russell v. Akeley Lumber Co.*, 45 Minn. 376, 48 N. W. 3; *Merchants' National Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653; *Osborne v. Lindstrom*, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715; *Wrightman v. Boone County*, 82 Fed. 412.

²⁸ *Friedman v. McGowan*, 1 Penn. (Del.) 436, 42 Atl. 723; *Thoeni v. Dubuque*, 115 Iowa, 482, 88 N. W. 967; *Waples v. Dubuque*, 116 Iowa, 167, 89 N. W. 194; *Lawrence v. Louisville*, 96 Ky. 595, 29 S. W. 450, 49 Am. St. Rep. 309, 27 L. R. A.

hold that, when a new statute of limitations is passed, existing causes of action have the full period prescribed by the new law, to be computed from the date of its going into effect, and that the time which has elapsed after the accrual of the cause of action and before the taking effect of the new act is not to be reckoned as any part of the period prescribed, unless the statute otherwise provides.²⁹ A statute provided that no will should be subject to *caveat* or other objection to its validity after three years from its probate. Before this act there had been no limitation in the matter. The court held that the act applied to all wills, but that, as to those probated before it took effect, it allowed three years from that date.³⁰

§ 708. Same — Whether rights once barred may be revived.— The weight of authority is that an action once barred cannot be revived by a repeal of the statute of limitations or otherwise.³¹ The bar of the statute is held to be

560; McKisson v. Davenport, 83 Mich. 211, 47 N. W. 100; Elsea v. Pryor, 87 Mo. App. 157; Pitman v. Bump, 5 Ore. 17; Dickerson v. Central R. R. Co., 7 Pa. Dist. Ct. 104; State v. Pinckney, 22 S. C. 484; Maslin v. Hiett, 37 W. Va. 15, 16 S. E. 437; McCormick v. Eliot, 43 Fed. 469.

²⁹ Swamp Land District v. Glide, 112 Cal. 85, 44 Pac. 451; Southgate v. Frier, 8 Okl. 435, 57 Pac. 841; Garrison v. Hill, 81 Md. 551, 32 Atl. 191.

³⁰ Garrison v. Hill, 81 Md. 551, 32 Atl. 191. The court says: "Taking all the circumstances into consideration, it is apparent that the legislature intended to apply this law to all wills, but did not intend to make it retroactive in its operation. We therefore think that the limitation fixed by the statute should commence to run when the

proceeding to affect the validity of a will is first subjected to the operation of the statute, which in this case is the date of the passage of the act. Although it may be said that this permits this *caveat* to be filed more than three years after the probate of the will, still it is within three years from the time the statute can lawfully affect it or apply to it." p. 557.

³¹ Peiser v. Griffin, 125 Cal. 9, 57 Pac. 690; Massachusetts Mut. Life Ins. Co. v. Colorado L. & T. Co., 20 Colo. 1, 36 Pac. 793; Bowen v. New York, etc. R. R. Co., 59 Conn. 364, 21 Atl. 1073; Board of Education v. Blodgett, 155 Ill. 441, 40 N. E. 1025, 46 Am. St. Rep. 348; Garrison v. Hill, 81 Md. 551, 32 Atl. 191; Dyer v. Belfast, 88 Me. 140, 33 Atl. 790; Flynn v. Lemieux, 46 Minn. 458, 49 N. W. 238; Whitney v. Wegler, 54 Minn. 235, 55 N. W. 927; Nichols v.

a vested right which the legislature cannot impair. Some courts, however, hold the contrary.³² The supreme court of the United States says: "We are unable to see how a man can be said to have *property* in the bar of the statute as a defense to his promise to pay. In the most liberal extension of the use of the word *property*, to choses in action, to incorporeal rights, it is new to call the defense of lapse of time to the obligation to pay money, *property*. It is no natural right. It is the creation of conventional law. We can understand the right to enforce the payment of a lawful debt. The constitution says that no state shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfill his honest obligations."³³

§ 709. **Election and ballot laws.**—Laws relating to elections have multiplied in recent years. Besides the matters formerly covered by election laws the recent statutes provide in detail for the nomination of candidates for office, the preparation of official ballots and the manner in which the elector shall designate his choice upon the ballot. The courts will, in general, so construe these laws as to prevent the disfranchisement of voters by reason of irregularities and omissions of officials, or by reason of a failure of the voter to comply strictly with the law in preparing and marking

Cass, 65 N. H. 212, 23 Atl. 430; Mass. 472, 59 N. E. 1033, 86 Am. St. Whitney v. Dey, 90 N. C. 542; Ireland v. Mackintosh, 22 Utah, 296, 61 Pac. 901; Eingartner v. Illinois Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871.

³² Campbell v. Holt, 115 U. S. 620, 6 S. C. Rep. 209, 29 L. Ed. 483; Danforth v. Groton Water Co., 178

Rep. 495; Dunbar v. Boston & P. R. R. Co., 181 Mass. 383, 63 N. E. 916; Bender v. Crawford, 33 Tex. 745. And see Hulbert v. Clark, 128 N. Y. 295, 23 N. E. 638, 14 L. R. A. 59.

³³ Campbell v. Holt, 115 U. S. 620, 6 S. C. Rep. 209, 29 L. Ed. 483.

his ballot.³⁴ In *Bowen v. Smith*³⁵ the court says: "It has sometimes been said, in this connection, that certain provisions of election laws are mandatory and others directory. These terms may, perhaps, be convenient to distinguish one class of irregularities from the other. But, strictly speaking, all provisions of such laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview. But it does not, therefore, follow that every slight departure therefrom should taint the whole proceedings with a fatal blemish. Courts justly consider that the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end; and, in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a full and fair expression of the voters' choice."

If the statute provides that ballots which fail to conform to certain requirements shall not be counted, the command is imperative.³⁶

³⁴ *Kellogg v. Hickman*, 12 Colo. 256, 21 Pac. 325; *Allen v. Glynn*, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743; *Flannagan v. Hynes*, 75 Conn. 581; *Rexroth v. Schein*, 206 Ill. 80; *Tombaugh v. Grogg*, 146 Ind. 99, 44 N. E. 994; *Cook v. Fisher*, 100 Iowa, 27, 69 N. W. 264; *Rogers v. Jacob*, 88 Ky. 502, 11 S. W. 513; *Houston v. Steele*, 98 Ky. 596, 34 S. W. 6; *Horning v. Board of Canvassers*, 119 Mich. 51, 77 N. W. 446; *Pennington v. Hare*, 60 Minn. 146, 62 N. W. 116; *Hughes v. Upson*, 84 Minn. 85, 86 N. W. 782; *Truelsen v. Hugo*, 87 Minn. 139, 91 N. W. 434; *Bowen v. Smith*, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491; *Hall v. Schornecke*, 128 Mo. 661, 31 S. W. 97; *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502; *State v. Russell*, 34 Neb. 116, 51 N. W. 465, 33 Am. St. Rep. 625; *State v. Norris*, 37 Neb. 299, 55 N. W. 1086; *Butler's Nomination*, 4 Pa. Dist. Ct. 187; *State v. Fawcett*, 17 Wash. 188, 49 Pac. 346; *State v. Burdick*, 6 Wyo. 448, 465, 46 Pac. 854. See *Van Winkle v. Crabtree*, 34 Ore. 462, 55 Pac. 831, 56 Pac. 74; *Hope v. Flentge*, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 806.

³⁵ 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491.

³⁶ *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585; *Orr v. Bailey*, 59 Neb. 128, 80

§ 710. Statutes giving an action for wrongful death.— Statutes which give an action for wrongfully causing the death of a person are in derogation of the common law, and, according to the general rule, should be strictly construed.³⁷ Some courts hold that they are remedial and should receive a liberal construction,³⁸ or, at all events, that they should not receive a narrow or technical construction.³⁹ Actions founded on those statutes must strictly conform to them.⁴⁰ Such an action cannot be given by implication.⁴¹ The relief or remedy provided is not extended to any other persons than those mentioned in the statute.⁴² When given to a "child," an illegitimate has been held in England not within the statute, though the case was for negligently causing the mother's death;⁴³ but it has been held otherwise in this country.⁴⁴ But where the right of action was given in favor of the next of kin of the deceased, it was held to mean the next of kin as defined from time to time by statute, and a subsequent act making the mother of an illegitimate child the heir of such child was held to give her a right of action for his death.⁴⁵ Where the action is

N. W. 495; *Sego v. Stoddard*, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468.

³⁷ *Ante*, §§ 573-575; *Thornburg v. Am. Strawboard Co.*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334.

³⁸ *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352.

³⁹ *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, 63 N. W. 941.

⁴⁰ *Telfer v. Northern R. R. Co.*, 30 N. J. L. 188, 209; *Hayes v. Phelan*, 4 Hun, 733; *Galveston, etc. R. R. Co. v. Le Gierse*, 51 Tex. 189.

⁴¹ *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456.

⁴² *Green v. Hudson R. R. Co.*, 32 Barb. 25; *Warren v. Englehart*, 13 Neb. 283; *Dickins v. N. Y. Cent. R. R. Co.*, 23 N. Y. 159; *Woodward*

v. Railway Co., 23 Wis. 400. See *Houston, etc. Ry. Co. v. Bradley*, 45 Tex. 171.

⁴³ *Dickinson v. Northeastern Ry. Co.*, 2 H. & C. 735; *Blake v. Midland Ry. Co.*, 10 L. & Eq. 437; *Gibson v. Midland Ry. Co.*, 15 Am. & Eng. R. R. Cas. 507; 2 Ont. 658. See *Gardner v. Heyer*, 2 Paige, 11.

⁴⁴ *Muhl's Adm'r v. Mich. Southern R. R. Co.*, 10 Ohio St. 272. In *Alabama & V. Ry. Co. v. Williams*, 78 Miss. 209, 28 So. 853, 84 Am. St. Rep. 624, it was held that a mother could not sue for the death of her illegitimate child.

⁴⁵ *Security Title & Trust Co. v. West Chicago St. Ry. Co.*, 91 Ill. App. 332.

given for the death of a child, it was held that a stepfather could not sue for the death of his stepchild.⁴⁶

These statutes are confined to pecuniary damages, though it has been said that the word "damages" is not taken in a very strict sense.⁴⁷ Every element is excluded which is not included in the meaning expressed by "pecuniary damages."⁴⁸ The South Carolina statute does not contain the restrictive word "pecuniary" to limit damages in such cases, and gives a broader scope of recovery.⁴⁹ Where a general statute as to wrongful death limited the damages to the pecuniary injury, and a special statute in reference to wrongful death caused by railroads provided that the jury might give "such amount of damages as they shall deem fair and just to the persons who may be entitled to such damages when recovered," the latter was construed as limited to the pecuniary injury, as otherwise the act would be class legislation.⁵⁰ Where the statute gave a right to re-

⁴⁶ *Thornburg v. Am. Strawboard Co.*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334.

⁴⁷ *Tilley v. Hudson R. R. Co.*, 24 N. Y. 474; *Penn. R. R. Co. v. Keller*, 67 Pa. St. 300; *Union Pac. R. R. Co. v. Dunden*, 34 Am. & Eng. R. R. Cas. 88, 37 Kan. 1; *Carroll v. Mo. Pac. R. R. Co.*, 26 Am. & Eng. R. R. Cas. 268, 88 Mo. 239; *St. Lawrence, etc. R. R. Co. v. Lett*, 26 Am. & Eng. R. R. Cas. 454; *Telfer v. Northern R. R. Co.*, 30 N. J. L. 188; *Little Rock, etc. R. R. Co. v. Barker*, 39 Ark. 491.

⁴⁸ *Id.*; *Searles v. Kanawha, etc. R. R. Co.*, 27 Am. & Eng. R. R. Cas. 179, 32 W. Va. 370; *Cleveland, etc. R. R. Co. v. Rowan*, 66 Pa. St. 393, 399; *Penn. R. R. v. Butler*, 57 id. 335, 338; *Mo. Pac. R. R. Co. v. Lee*, 35 Am. & Eng. R. R. Cas. 364, 70 Tex. 496; *Gulf, etc. Ry. Co. v. Levy*, 12 Am. & Eng. R. R. Cas. 90, 93;

Baltimore, etc. R. R. Co. v. Hauer, id. 149, 60 Md. 449; *North Chicago Rolling Mills Co. v. Morrissey, Adm'r*, 18 Am. & Eng. R. R. Cas. 47, 111 Ill. 646; *Bradburn v. Great W. Ry. Co.*, L. R. 10 Ex. 1; *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282; *Kansas Pac. R. R. Co. v. Lundin*, 3 Colo. 94; *Macon, etc. R. R. Co. v. Johnson*, 38 Ga. 409; *David v. Southwestern R. R. Co.*, 41 id. 223; *Baltimore, etc. R. R. Co. v. Kelly*, 24 Md. 271; *Baltimore, etc. R. R. Co. v. Trainor*, 33 id. 542; *Johnson v. Chicago, etc. R. R. Co.*, 64 Wis. 425, 25 Am. & Eng. R. R. Cas. 338, 25 N. W. 223.

⁴⁹ *Petrie v. Columbia, etc. R. Co.*, 35 Am. & Eng. R. R. Cas. 430, 29 S. C. 303. See *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20; *Little Rock, etc. Ry. Co. v. Barker*, 39 Ark. 491.

⁵⁰ *Van Brunt v. Cincinnati, etc.*

cover punitive damages it was held to imply the right to recover compensatory damages also.⁵¹ Though the action is given for the benefit of the widow and next of kin, the statute is not construed so strictly as to be limited to cases where there are both widow and next of kin.⁵² Nor are the next of kin required to be so nearly related as to create any duty of sustenance, support or education.⁵³ Where the action was given to the widow, heir, or personal representative, it was held that the widow had the prior right.⁵⁴ A settlement or recovery by the deceased in his life-time for the injury from which death ensued was held a bar to any suit by the widow or next of kin.⁵⁵ Where an action for wrongful death was given against the receiver in charge or control of any railroad, it was held to include street railroads.⁵⁶ Where there was a recovery in Kentucky for a death caused in another state, it was held that the amount should be distributed according to the laws of the latter state.⁵⁷

§ 711. **Married women's acts.**—Statutes enlarging the rights of married women in respect to their separate property are held by some courts to be in derogation of the common law and to be strictly construed,⁵⁸ while other courts

R. R. Co., 78 Mich. 530, 44 N. W. 321; *Richmond v. Chicago & West Mich. Ry. Co.*, 87 Mich. 374, 49 N. W. 631.

⁵¹ *Henderson's Adm'r v. Kentucky Cent. R. R. Co.*, 86 Ky. 389, 5 S. W. 875; *Jordan's Adm'r v. Cincinnati, etc. Ry. Co.*, 89 Ky. 40, 11 S. W. 1013.

⁵² *McMahon v. Mayor, etc.*, 33 N. Y. 642, 647.

⁵³ *Tilley v. Hudson R. R. Co.*, 24 N. Y. 474; *Galveston, etc. R. R. Co. v. Kutac*, 37 Am. & Eng. R. R. Cas. 470, 72 Tex. 643; *Petrie v. Columbia, etc. R. R. Co.*, 29 S. C. 303; *Railroad Co. v. Barron*, 5 Wall. 90,

18 L. Ed. 591; *Baltimore, etc. Co. v. Hauer*, 12 Am. & Eng. R. R. Cas. 149, 155, 60 Md. 449. See *Pittsburgh, etc. R. R. Co. v. Vining's Adm'r*, 27 Ind. 513.

⁵⁴ *Henderson's Adm'r v. Kentucky Cent. R. R. Co.*, 86 Ky. 389, 5 S. W. 875; *Jordan's Adm'r v. Cincinnati, etc. R. R. Co.*, 89 Ky. 40, 11 S. W. 1013.

⁵⁵ *Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016.

⁵⁶ *Bammel v. Kirby*, 19 Tex. Civ. App. 198, 47 S. W. 392.

⁵⁷ *McDonald v. McDonald*, 96 Ky. 209, 28 S. W. 482, 49 Am. St. Rep. 289.

⁵⁸ *Kohn v. Collison*, 1 Marvel

hold that they are remedial and to be liberally construed.⁵⁹ In *Wills v. Jones*,⁶⁰ it is said to be the policy of modern legislation to place the wife, in respect to property and business matters, on a perfect equality with the unmarried woman, and that "the time would seem, therefore, to have arrived when the courts should no longer give these statutes a narrow or illiberal construction, such as they may have heretofore received, but a broad and reasonable one, such as may best subserve the spirit and the purpose of their enactment."

Such acts are construed as not enlarging the power of the wife to contract beyond what is expressly declared or necessarily implied.⁶¹ Power to contract as a *feme sole* was held not to enable the wife to convey her real estate without her husband joining as provided in the act on conveyances,⁶² though it may enable her to bind herself by an executory contract to convey.⁶³ Such acts do not affect the vested rights of the husband in the property of the wife, owned or possessed by her at the time the act goes into effect.⁶⁴

(Del.), 109, 27 Atl. 834; *Compton v. Pierson*, 28 N. J. Eq. 229.

⁵⁹ *Stiles v. Lord*, 2 Ariz. 154, 11 Pac. 314; *Wills v. Jones*, 13 App. Cas. (D. C.) 482; *Claw v. Chapman*, 125 Mo. 101, 28 S. W. 338, 46 Am. St. Rep. 468, 26 L. R. A. 412; *Velten v. Carmack*, 23 Ore. 282, 31 Pac. 658, 20 L. R. A. 101.

⁶⁰ 13 App. Cas. (D. C.) 482.

⁶¹ *Hatton v. Wier*, 19 Ala. 127; *Gibson v. Marquis*, 29 Ala. 668; *Canty v. Sanderford*, 37 Ala. 91; *Alexander v. Saulsbury*, 37 Ala. 375; *Warfield v. Ravasies*, 38 Ala. 518; *Perryman v. Greer*, 39 Ala. 133; *Cook v. Meyer*, 73 Ala. 580; *Morgan v. Bolles*, 36 Conn. 175; *Cunningham v. Hanney*, 12 Ill. App. 437; *Triplett v. Graham*, 58 Iowa, 135;

Weber v. Weber, 47 Mich. 569; *Citizens' State Bank v. Smout*, 62 Neb. 223, 86 N. W. 1068; *Grand Island Banking Co. v. Wright*, 53 Neb. 574, 74 N. W. 82; *Westervelt v. Baker*, 56 Neb. 63, 76 N. W. 440; *Reynolds v. Robinson*, 64 N. Y. 589; *Dorris v. Erwin*, 101 Pa. St. 239; *Quick v. Miller*, 103 Pa. St. 67; *Stiles v. Lord*, 2 Ariz. 154, 11 Pac. 314; *Kohn v. Collison*, 1 Marvel (Del.), 109, 27 Atl. 834; *Bragg v. Grail*, 86 Mo. App. 338.

⁶² *Bartlett v. Roberts*, 66 Mo. App. 125; *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13.

⁶³ *Davis v. Watson*, 89 Mo. App. 15.

⁶⁴ *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218; *Rose v. Rose*, 104 Ky.

A statute that "husband and wife shall have the same civil remedies upon contracts in their own name and right against all persons, for the protection and recovery of their separate property, as unmarried persons," was held not to permit the wife to sue her husband. The court said that "so great a change in the policy of the law, upon a subject that may come home to every householder in the commonwealth, should not rest on inference or implication from general words, but should appear by the explicit and unquestionable mandate of the legislature."⁶⁵ So it has been held that, under a different statute, a divorced woman could not sue for the personal tort of her husband committed during coverture.⁶⁶ Some statutes expressly give the wife the right to sue her husband in respect to certain matters.⁶⁷ Where the husband held the wife's note for borrowed money it was held that he could prove it against her estate as an ordinary claim.⁶⁸ Where the statute enables a wife to sue in respect to her separate property and personal rights as if sole, she may maintain suits for assault, slander, alienation of her husband's affections and the like.⁶⁹ But such statutes have been held not to apply to contracts made or wrongs committed prior to the act,⁷⁰ or to abolish the common-law

48, 46 S. W. 524, 84 Am. St. Rep. 430; *Leete v. State Bank*, 114 Mo. 574, 42 S. W. 1074; *Clay v. Mayr*, 144 Mo. 376, 46 S. W. 157; *Graves v. Wood*, 87 Mo. App. 92; *Allen v. Colburn*, 65 N. H. 37, 17 Atl. 1060, 23 Am. St. Rep. 20; *Mabie v. Whitaker*, 10 Wash. 656, 39 Pac. 172. See *Hart v. Leete*, 104 Mo. 315, 15 S. W. 976.

⁶⁵ *Small v. Small*, 129 Pa. St. 366, 18 Atl. 497.

⁶⁶ *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 72 Am. St. Rep. 550, 40 L. R. A. 757.

⁶⁷ *Arnold v. Arnold*, 140 Ind. 199,

39 N. E. 862; *Grubbe v. Grubbe*, 26 Ore. 363, 38 Pac. 182.

⁶⁸ *Grimes v. Reynolds*, 94 Mo. App. 576, 68 S. W. 588. *Contra*, *Lindsay v. Archibald*, 65 Mo. App. 120.

⁶⁹ *Hatton v. Wilmington City Ry. Co.*, 3 Penn. (Del.) 159, 50 Atl. 633; *Berger v. Jacobs*, 21 Mich. 215; *Leonard v. Pope*, 27 Mich. 145; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468, 26 L. R. A. 412.

⁷⁰ *Wood v. Vernon*, 8 Houst. 48, 12 Atl. 656; *Rogers v. Lynch*, 44 W. Va. 94, 29 S. E. 507.

rule that the husband must be joined in a suit for a tort of the wife.⁷¹

A statute giving to married women the control of their separate property, and authorizing them to contract, and to sue and be sued, in relation thereto as if sole, does not authorize her to enter into partnership with her husband and to bind her separate estate by such venture.⁷² An act that "all real and personal estate hereafter acquired by any married woman, whether by gift, grant, purchase, inheritance, devise or bequest, shall be and continue her sole and separate property," etc., was held not to embrace a right of action for personal injury, as it was not acquired in any of the ways specified, and the husband was held to retain his common-law interest in such right of action.⁷³ An act relating to the property of married women, and its control and disposition, was held not to apply to women out of the state, but an act making it lawful for married women owning any loan of the state or of a city therein, to transfer it, as if unmarried, was held to apply to non-resident women.⁷⁴

§ 712. **Other acts relating to husband and wife.**—Where a statute made the expenses of the family a charge against both husband and wife, it was held not to apply to debts contracted before its passage.⁷⁵ Under such a statute the wife was held liable on the husband's contracts only so far as the family received the benefit thereof, and therefore

⁷¹ Taylor v. Pullen, 152 Mo. 434, 53 S. W. 1086. "It has not been the policy in this state," says the court, "for the courts to move in advance of a clearly expressed purpose to remove the common-law disabilities, rights and liabilities of married women, or to change marital relations."

⁷² Haggett v. Hurley, 91 Me. 542, 40 Atl. 561, 40 L. R. A. 362; Artman v. Ferguson, 73 Mich. 146, 40 N. W. 907, 16 Am. St. Rep. 572, 2 L. R. A. 343; Mayer v. Soyster, 30 Md.

402; Haas v. Shaw, 91 Ind. 384; Lord v. Parker, 3 Allen, 127; Bowker v. Bradford, 140 Mass. 521, 5 N. E. 480; Kaufman v. Schoeffel, 37 Hun, 140; Payne v. Thompson, 44 Ohio St. 192; Cox v. Miller, 54 Tex. 16.

⁷³ Norfolk & W. R. R. Co. v. Prindle, 82 Va. 122.

⁷⁴ Loftus v. F. & M. National Bank, 133 Pa. St. 97, 19 Atl. 347.

⁷⁵ Kelly v. Canon, 6 Colo. App. 465, 41 Pac. 833.

was held not liable for the rent of a house after it ceased to be occupied by the family, though the lease made by the husband had not expired.⁷⁶ Where a statute provided that the wife's property should be subject to execution for any debt or liability of her husband created for necessities for the wife or family, it was held that execution might issue against the wife's property on a judgment against the husband alone.⁷⁷ Where a statute put married women and men on the same basis as to the making of a will and the right to dispose of property by will, it was held that a woman's will was not revoked by her subsequent marriage and that the common-law rule to that effect was abrogated by the statute.⁷⁸

§ 713. **Game laws.**—Where a statute makes it unlawful for one to have in his possession certain animals, birds or fish during specified periods, it is held not to apply to game lawfully taken in the open season.⁷⁹ Whether such a statute applies to game taken or killed in another state there is a difference of opinion. Some courts hold that such possession is unlawful,⁸⁰ others the contrary.⁸¹ Where such possession is made unlawful, it makes no difference what the intent or purpose of the possession is.⁸² A statute made it

⁷⁶ *Straight v. McKay*, 15 Colo. App. 60, 60 Pac. 1106.

⁷⁷ *Gabriel v. Mullen*, 111 Mo. 119, 19 S. W. 1099, overruling *Bedsworth v. Bowman*, 104 Mo. 44, 15 S. W. 990.

⁷⁸ *Kelley v. Stevenson*, 85 Minn. 247, 88 N. W. 739, 89 Am. St. Rep. 545, citing *In re Ward's Will*, 70 Wis. 251, 35 N. W. 781; *Noyes v. Southworth*, 55 Mich. 173, 20 N. W. 891; *Fellows v. Allen*, 60 N. H. 439; *In re Hunt*, 81 Me. 275, 17 Atl. 68; *Morton v. Onion*, 45 Vt. 145; *In re Fuller's Will*, 79 Ill. 99; *Webb v. Jones*, 36 N. J. Eq. 163; *Colcord v. Conroy*, 40 Fla. 97, 23 So. 561.

⁷⁹ *State v. McGuire*, 24 Ora. 366, 33 Pac. 666, 21 L. R. A. 478; *Allen*

v. Young, 76 Me. 80; *Commonwealth v. Hall*, 128 Mass. 410; *Simpson v. Unwin*, 3 B. & Ad. 134.

⁸⁰ *State v. Schuman*, 36 Ora. 16, 58 Pac. 661, 78 Am. St. Rep. 754, 47 L. R. A. 153; *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259, 46 Am. St. Rep. 566; *Roth v. State*, 7 Ohio C. C. 62; *State v. Farrell*, 23 Mo. App. 176; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140.

⁸¹ *Commonwealth v. Wilkinson*, 139 Pa. St. 298, 21 Atl. 14; *Dickhaut v. State*, 85 Md. 451, 37 Atl. 21, 60 Am. St. Rep. 332, 36 L. R. A. 765; *People v. Allen*, 20 Misc. 120, 45 N. Y. S. 74.

⁸² *Haggerty v. St. Louis Ice, etc.*

an offense for a person to have in his possession certain game birds "from the first day of January to the first day of October." It was held to mean *between* the dates mentioned.⁸³ A statute made it unlawful to catch trout "between the first day of October of each year and the first day of June of each year." In view of the order of the dates and the practical construction that had been placed on the law, it was construed to mean from the first day of October of one year to the first day of June of the next year.⁸⁴ A statute provided that no person should "kill, expose for sale, or have in his possession after the same is killed any eagle . . . or any song bird." The words "expose for sale" and "have in possession" were held to refer to dead birds only, as though the statute read "expose for sale after the same is killed, or have in possession after the same is killed, any eagle," etc.⁸⁵ A statute forbade the taking of fish, except by rod and line, in any of the streams, lakes, rivers or ponds of the state, except private ponds. A body of water of ten hundred and forty acres in extent, owned by two persons, connected with the Mississippi river and subject to overflow therefrom, was held not to be a private pond within the act.⁸⁶ In another case it was held that, in order to constitute a private pond in such connection, the whole must be under one title.⁸⁷

§ 714. Acts relating to public officers, their compensation, qualifications, election, etc.—Acts relating to the fees and compensation of public officers are strictly construed and such officers are only entitled to what is clearly given by law.⁸⁸ A law will not be construed as giving an

Co., 143 Mo. 238, 44 S. W. 1114, 65 Am. St. Rep. 647.

⁸³ State v. Starr, 20 R. I. 269, 38 Atl. 654.

⁸⁴ Ex parte Hewlett, 22 Nev. 333, 40 Pac. 96. Compare Eureka v. Diaz, 89 Cal. 467, 26 Pac. 961.

⁸⁵ People v. Fishbough, 134 N. Y. 393, 31 N. E. 983.

⁸⁶ Peters v. State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114.

⁸⁷ Reynolds v. Commonwealth, 93 Pa. St. 458.

⁸⁸ Ewing v. Ainger, 96 Mich. 587, 55 N. W. 996; S. C. affirmed on rehearing, 97 Mich. 381, 56 N. W. 767; State v. Wofford, 116 Mo. 220, 22 S. W. 486; State v. Murphy, 101 Tenn.

officer additional compensation for past services unless the intent is clearly expressed.⁸⁹ A city charter provided that "the aldermen shall not be allowed to receive more than one hundred dollars each in any year as compensation for their services." The charter made them *ex officio* members of the board of registration in their respective precincts and inspectors of election. It was held that they were not entitled to any additional compensation for these *ex officio* services.⁹⁰ A statute provided that all city officers should be paid a fixed salary and that they should turn over all fees and commissions to the city. In case of policemen, the latter provision was held to apply only to fees and commissions for services performed for the city and that they were entitled to keep their fees in state cases.⁹¹

The charter of a city provided that the mayor should be elected annually on the second Saturday of December and that his term of office should be one year from the first Monday of January following. In December, 1892, the charter was amended so as to provide that the term of the mayor to be elected on the second Saturday of December, 1892, should be two years and that thereafter elections for mayor should be held biennially. The amendment passed the senate on December 5, but did not pass the house until December 15 and did not become a law until December 23. In the meantime a mayor was elected under the old law on December 10. It was held to be the clear intent of the law that the mayor elected on December 10, 1892, should hold for two years and it was so decided.⁹² An Iowa statute provided that when an incorporated town, by virtue of its

515, 47 S. W. 1098; *United States v. Patterson*, 150 U. S. 65, 14 S. C. Rep. 20, 37 L. Ed. 999. But see *United States v. Averill*, 4 Utah, 416; S. C. reversed, 130 U. S. 335, 9 S. C. Rep. 546, 32 L. Ed. 977; *United States v. Morse*, 3 Story, 87, Fed. Cas. No. 15,820.

⁸⁹ *Hughston v. Carroll County*, 68 Miss. 660, 10 So. 51.

⁹⁰ *Alberts v. Torrent*, 98 Mich. 512, 57 N. W. 569.

⁹¹ *Burke on Petition*, 101 Ky. 175, 40 S. W. 379.

⁹² *Lamb v. Dunwoody*, 94 Ga. 58, 20 S. E. 637. *Sipe v. People*, 26 Colo. 127, 56 Pac. 571, presents almost identical facts and the same conclusion was reached.

population, became a city of the second class, such city should, at the next regular annual election, proceed to organize according to its new grade by the election of the officers properly belonging to such cities. Prior to 1886 the mayor and other officers were elected annually. In that year an act was passed making the terms of such officers two years and providing that the first election under the act should be held on the first Monday of March, 1887. Where an incorporated town became a city of the second class in an even year and in time for the spring election of that year, it was held that the officers chosen at such election would hold for two years, so that the elections in such city would occur in the even years.⁹³ Where a statute provided for the appointment of an oil inspector who should remain in office for four years, unless removed for misconduct, the act was held to create a four-year term, so that one appointed to fill a vacancy would hold only for the unexpired period.⁹⁴

It has been held that there may be a vacancy in an office before it has ever been filled, within the meaning of a provision as to filling vacancies.⁹⁵ The death of a person elected to an office before his qualification was held not to create a vacancy which could be filled by appointment.⁹⁶

Where an act provided that certain officers should be appointed by the governor by and with the advice and consent of the senate, and that, if a vacancy occurred, it should be filled by the governor for the unexpired term, it was held that the governor could fill vacancies without the concurrence of the senate.⁹⁷ When the law is silent as to the

⁹³ *State v. Wyman*, 97 Iowa, 570, 66 N. W. 786.

⁹⁴ *Hoke v. Richie*, 100 Ky. 66, 37 S. W. 266, 88 S. W. 132. And see *Sherman v. Des Moines*, 100 Iowa, 88, 69 N. W. 410.

⁹⁵ *State v. Scott*, 36 W. Va. 704, 15 S. E. 405; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243.

⁹⁶ *Lawrence v. Hanley*, 84 Mich. 399, 47 N. W. 753. As to the tenure of one appointed to fill a vacancy under particular statutes, see *State v. Blakemore*, 104 Mo. 340, 15 S. W. 960; *State v. Perkins*, 139 Mo. 106, 40 S. W. 650.

⁹⁷ *State v. Manson*, 105 Tenn. 232, 58 S. W. 319.

qualifications for an office electors only are eligible.⁹⁸ Where persons convicted "of malfeasance in office, bribery or other corrupt practices" were ineligible, it was held that a conviction for selling lottery tickets was not within the statute.⁹⁹

A general power to remove an officer elected for a definite term was held to mean for cause only and to imply a right on the part of the officer to notice and a hearing.¹ The county board of auditors was authorized to remove any county officer or appointee, when in their opinion he was incompetent to properly execute the duties of his office or for misconduct on charges preferred and evidence heard. It was held that they could remove for incompetency without charges or hearing.²

§ 715. Statutes requiring majority vote.—A constitutional provision required that any act changing the mode of taxing railroads should not go into effect until adopted "by a majority of the electors of the state voting at the election at which the same shall be submitted to them." This was held to mean a majority of all voting at the election and not merely a majority of those voting on the adoption of the act.³ Similar language has received the same construction in other cases.⁴ On the other hand, where the constitution forbade a county to become indebted in any year to an amount exceeding the revenue for that year "without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose," it was held to mean two-thirds of those voting on that question and not two-thirds of all who voted for any purpose.⁵ Other cases are to the same effect.⁶

⁹⁸ Attorney-General v. Abbot, 121 Mich. 540, 80 N. W. 372.

⁹⁹ State v. Bersch, 83 Mo. App. 657.

¹ State v. Walker, 68 Mo. App. 110. And see Todd v. Dunlop, 99 Ky. 449, 36 S. W. 541.

² Trainor v. Board of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95.

³ State v. Stearns, 72 Minn. 200, 75 N. W. 210.

⁴ Stebbins v. Superior Court Judge, 108 Mich. 693, 66 N. W. 594; State v. McGowan, 138 Mo. 187, 39 S. W. 771.

⁵ Montgomery County Fiscal Court v. Trimble, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738.

⁶ Wells v. Ragsdale, 102 Ga. 53,

Where an act was not to go into effect "until ratified by a majority of the voters of said county of Floyd at an election held for that purpose," it was held to mean a majority of those voting at the election and not a majority of all voters in the county.⁷ But a provision that no county, city, town or other municipal corporation should contract any debt or loan its credit, "unless by a vote of the majority of the qualified voters therein," was held to require a majority of the qualified or registered voters and not merely of those voting.⁸ "A majority vote of the electors of a county" means a majority of those voting.⁹

A law to create a new county provided that it should not go into effect unless "a majority of the legal voters of said K. county and of said range 69 shall vote in favor of said segregation." It was held to require a majority in each.¹⁰ Where a majority of the ballots cast is required, only legal ballots are to be considered in computing the majority.¹¹ Where a two-thirds vote of all the members elected to a city council was required to pass certain measures, it was held, where the body consisted of thirteen members, that ten votes were necessary,¹² and where it consisted of eight members and one was dead, that six votes were necessary.¹³

§ 716. Words and provisions relating to time and its computation.—The word "day" means the twenty-four hours from midnight to midnight.¹⁴ The word "month" is

29 S. E. 165; *Tinkel v. Griffen*, 26 Mont. 426, 68 Pac. 859; *State v. Grace*, 20 Ore. 154, 25 Pac. 382.

⁷ *Chamlee v. Davis*, 115 Ga. 266, 41 S. E. 691. To same effect, *State v. White*, 162 Mo. 533, 63 S. W. 104.

⁸ *Lynchburg & D. R. R. Co. v. Pearson County Com'rs*, 109 N. C. 159, 13 S. E. 783.

⁹ *Shearer v. Board of Supervisors*, 128 Mich. 552, 87 N. W. 789. To same effect, *State v. Ruhe*, 24 Nev. 251, 52 Pac. 274.

¹⁰ *Van Dusen v. Fridley*, 6 Dak. 322, 43 N. W. 703.

¹¹ *State v. Lammers*, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501.

¹² *State v. Elizabeth*, 59 N. J. L. 134, 36 Atl. 673.

¹³ *State v. Hoboken*, 52 N. J. L. 88, 18 Atl. 685.

¹⁴ *Eureka v. Diaz*, 89 Cal. 467, 26 Pac. 961; *Henderson v. Reynolds*, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327; *State v. Michel*, 52 La. Ann. 936, 27 So. 565, 78 Am. St. Rep. 364; *Jones v. State*, 32 Tex. Crim. Rep. 533, 25 S. W. 124.

usually held to mean a calendar month.¹⁵ Where the judge, in capital cases, was required to designate a week of time during which the sentence should be executed, the word "week" was held to mean a calendar week, that is a period from midnight of Saturday night to midnight of the next Saturday night.¹⁶ Where an ordinance forbade the keeping open of a saloon "between the hours of 11 o'clock P. M. and 5 o'clock A. M. of each and every day," it was held to refer to hours in the same calendar day, and the keeping open between 11 P. M. of one day and 5 A. M. of the next day was held to be no violation.¹⁷ But where an act forbade the catching of trout "between the first day of October of each year and the first day of June of each year," it was held to mean between the first day of October of one calendar year and the first day of June of the next calendar year.¹⁸

Sun time will be considered as intended by statute unless the contrary is specified.¹⁹ A Georgia judge announced that he would run his court according to standard time, which was twenty-two minutes slower than sun time. A verdict was received at two minutes to twelve Saturday night, standard time, or twenty minutes past twelve, sun time. The court held that the verdict was received on Sunday and, in giving their opinion, say: "It seems idle to waste words in saying that the standard of time fixed by persons in a certain line of business cannot be substituted at will by persons in a certain locality for the standard recognized by the statutes of the state as well as the general law and usage of the country; especially when it is considered that such an arbitrary and artificial standard could as easily fix five

¹⁵ Guaranty Trust & Safe Dep. Co. v. Buddington, 27 Fla. 215, 9 So. 246, 12 L. R. A. 770. See *ante*, § 397.

¹⁶ In re Tyson, 13 Colo. 482, 22 Pac. 810, 6 L. R. A. 472.

¹⁷ Eureka v. Diaz, 89 Cal. 467, 26 Pac. 961.

¹⁸ Ex parte Hewlett, 22 Nev. 333, 40 Pac. 96.

¹⁹ Henderson v. Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327; Searles v. Aerhoff, 28 Neb. 668, 44 N. W. 872; Ex parte Parker, 35 Tex. Crim. Rep. 12, 29 S. W. 480, 790.

o'clock for midnight, as it could twenty minutes past twelve, as was done in this case. Local custom cannot in this way change Sunday into Saturday. To expect courts of justice, officers of the law and the public generally, especially that large class of the population who do not live in cities or at railroad stations, to go to the railroads for the time which is to guide them in the performance of their duties under the law, when they have in the heavens above them a certain standard by which to ascertain or regulate the time, or to permit them at will to follow two standards of time, would be highly impracticable, and would be productive of great uncertainty and confusion in the administration of the law. Thus the legality of elections might be made to depend upon conflicting proof of local custom; for what might be considered a legal election in one precinct might be regarded as illegal in the next precinct, because of the time of opening or closing the polls; or the people of one precinct might differ among themselves as to this. And so with regard to the enforcement of the criminal laws. The law requires the railroads to cease running their freight trains by eight o'clock on Sunday mornings. Code, § 4578. To allow the railroads to fix the standard of time would be to allow them at pleasure to violate or defeat the law."²⁰ The same rule is held to apply to contracts.²¹ A Minnesota statute as to the hours of closing saloons, passed in 1878, before standard time was in use; was re-enacted in 1889, when standard time had been in common use for some years. The re-enacted statute was held to refer to standard time.²²

§ 717 (440). Statutes relating to appeals, writs of error, etc.—Statutes giving the right of appeal are liberally construed in furtherance of justice;²³ such an interpretation

²⁰ Henderson v. Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327.

²² State v. Johnson, 74 Minn. 381, 77 N. W. 293.

²¹ Jones v. German Ins. Co., 110 Iowa, 75, 81 N. W. 188, 46 L. R. A. 860.

²³ Heil v. Simmonds, 17 Colo. 47, 28 Pac. 475; People v. Johnson, 23 Colo. 150, 46 Pac. 681; Stephens v.

as will work a forfeiture of that right is not favored.²⁴ Where the statute gave the defeated party twenty days "after personal notice of the judgment," it was held that the right might be exercised within that period after he received written notice from the party recovering the judgment. The court say: "This does not mean twenty days after he shall ascertain by his own inquiries or investigation that such judgment exists against him, but twenty days after he shall receive personal notice of the judgment from the party himself in whose favor the judgment was entered."²⁵ An act intended to extend the right of appeal is remedial and should receive a liberal construction. If it provides a remedy in a case where otherwise injustice might be done, it should be given effect in all cases where proceedings have not been had to such an extent as to exclude its application.²⁶ A statute giving a *certiorari* was so framed that literally it was available only to the complainant, to review proceedings in the statutory action for forcible entry and detainer. But as it was deemed reasonable to extend to the defendant the same means for the correction of errors, as to the plaintiff when similarly situated, the right was held reciprocal and alike demandable by either party.²⁷ The right of appeal is purely statutory.²⁸ Courts cannot impose conditions to the exercise of the right not found in the statute.²⁹ The word "appeal" may include writs of error or other modes of review.³⁰ Where an act gave an appeal to any one

Cherokee Nation, 174 U. S. 445, 19 S. C. Rep. 722, 43 L. Ed. 1041; Snyder v. Circuit Judge, 80 Mich. 511, 43 N. W. 583.

²⁴ Houk v. Barthold, 73 Ind. 21, 25; Pearson v. Lovejoy, 53 Barb. 407; Cally v. Anson, 4 Wis. 223.

²⁵ Id. As to notice in writing being required, see Gilbert v. Columbia T. Co., 3 Johns. Cas. 107; Miner v. Clark, 15 Wend. 425; Lane v. Cary, 19 Barb. 539; Matter of Cooper, 15 John. 532; McEwen v.

Montgomery Ins. Co., 5 Hill, 104; People v. Croton Aqueduct Board, 26 Barb. 248.

²⁶ Converse v. Burrows, 2 Minn. 229. See Vigo's Case, 21 Wall. 648, 22 L. Ed. 690.

²⁷ Russell v. Wheeler, Hempst. 3.

²⁸ State v. Kennie, 24 Mont. 45, 60 Pac. 589.

²⁹ State v. Karnes, 78 Mo. App. 51.

³⁰ State v. Jacksonville Terminal Co., 41 Fla. 363, 27 So. 221.

aggrieved, it was held to mean to any one injuriously affected.³¹

§ 718. **Statutes relating to costs.**—Statutes allowing costs, it was ruled at an early day, should be taken strictly, as being a kind of penalty.³² This reason is not strictly correct. Costs are compensatory to the prevailing party; they are allowed him to make his remedy more adequate. The liability to pay them is created by statute, because the party so made liable has furnished the occasion for incurring these costs. The obligation extends no further than it is plainly declared by the authority which creates it. "Costs are only recoverable when there is statutory authority awarding them."³³ Statutes imposing costs are strictly construed as penal in their nature and as creating liabilities which did not exist at common law.³⁴ The allowance of costs turns on the interpretation of the terms of the statutes and the intention deduced therefrom, and neither costs nor salaries can be given or increased by construction or in any indirect manner beyond the amount specified by law.³⁵

A statute which declared that "in all actions to recover

³¹ *Merrick v. Kennedy*, 46 Neb. 264, 64 N. W. 989.

³² *Cone v. Bowles*, 1 Salk. 205.

³³ *Hester v. Commissioners*, 84 Mich. 450, 47 N. W. 1097; *Rieker v. Danville*, 204 Ill. 191, 68 N. E. 403; *Aplin v. Baker*, 84 Mich. 113, 47 N. W. 515; *In re Green*, 40 Mo. App. 491; *Baldwin v. Boulware*, 82 Mo. App. 321; *Henley v. State*, 98 Tenn. 665, 41 S. W. 352.

³⁴ *Gehrke v. Gehrke*, 190 Ill. 166, 60 N. E. 59; *Dawson v. Matthews*, 105 Ala. 485, 17 So. 19; *Morrow v. Rosenstihl Bros.*, 106 Ala. 198, 17 So. 608; *Troup v. Morgan County*, 109 Ala. 162, 19 So. 503; *State v. Blackburn*, 61 Ark. 407, 33 S. W. 529; *In re Green*, 40 Mo. App. 491; *Cowan v. Jones*, 79 Mo. App. 222;

Baldwin v. Boulware, 82 Mo. App. 321; *Henley v. State*, 98 Tenn. 665, 41 S. W. 352; *Hecht v. Heimann*, 81 Mo. App. 370.

³⁵ *Walker v. Sheftall*, 73 Ga. 806; *Adams v. Abram*, 38 Mich. 302; *Van Horne v. Petrie*, 2 Cai. 213; *Briggs v. Allen*, 4 Hill, 538; *Farrington v. Rennie*, 2 Cai. 220; *Van Hovenburgh v. Case*, 4 Hill, 541; *Vielie v. Towers*, Colman & Cai. 90; *Dockstader v. Sammons*, 4 Hill, 546; *Clark v. Dewey*, 5 Johns. 251. Where the words of a statute prescribing the compensation of a public officer are loose and obscure, and admit of two interpretations, they should be construed in favor of the officer. *United States v. Morse*, 3 Story, 87, Fed. Cas. No. 15,820.

damages for torts the plaintiff shall recover no more costs than damages, where such damages do not exceed five dollars," was held not to authorize the court in such a case to render judgment against him for the residue of the costs.³⁶ A statute provided that referees appointed in a case should "receive such compensation for their services as the court in which the case is pending may allow, not exceeding ten dollars a day." No provision was made for payment, and it was held that the intent of the statute was that the compensation allowed should be taxed as costs.³⁷

§ 719. Conflicting petitions for the organization of territory and the like.—A statute of Minnesota to provide for the creation and organization of new counties and government of the same, permitted new counties to be formed from old counties and prescribed the mode of procedure and the limitations as to size and population. The statute expressly provided for the submission at the same election of more than one proposition and was silent as to conflicting petitions. The voter could vote for or against only one proposition at the same election. The statute provided that a petition which received a majority of the votes cast thereon should be declared adopted. Under this law four petitions to create four new counties out of Polk county were filed with the secretary of state on May 8, 1896, and were duly submitted by proclamation of the governor. These petitions did not conflict and were found in all respects valid. Afterwards and on July 14, 1896, two other petitions were filed for the organization of two new counties out of Polk county, each of which conflicted with the earlier petitions. These were submitted at the same election. One of the earlier propositions, for the organization of a county to be known as Red Lake, was carried and also both the later propositions, each of which conflicted with the Red Lake proposition. The Red Lake proposition not only had a majority of the votes cast on that proposition, but also a plurality over the

³⁶ *Ivey v. McQueen*, 17 Ala. 408.

³⁷ *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935.

two later propositions. The governor issued his proclamation declaring the Red Lake proposition carried and the county was duly organized. On *quo warranto* against the county, it was held to be legally organized.³⁸ The court held that it was proper to submit conflicting petitions at the same election, two of the judges dissenting on that point and holding that, in such case, the petition first filed should be submitted and the others rejected. It was also held that, in order that one of two or more conflicting petitions should be carried, it must receive a majority of the votes cast on that proposition and a plurality over its competitors.³⁹

In a later case to contest the election on one of the earlier petitions to organize Garfield county, which was defeated by only five votes, the same statute came up for further consideration. While the new counties were required to have a certain minimum of area and population and the old county must be left with at least the same minimum of area and population, the statute was otherwise silent as to the form and shape in which the territory should be taken or left. If Garfield county was organized as proposed, the re-

³⁸ *State v. Board of Commissioners*, 67 Minn. 352, 69 N. W. 1083.

³⁹ The court says: "While the statute states in general language that any proposition for the creation of a new county shall be declared adopted if it receives a majority of the votes cast thereon, yet it is absolutely certain that the legislature never intended that a competing proposition should be carried unless it also secured a plurality vote over all of its competitors. An intention to provide for the creation of three counties in part out of the same territory cannot be imputed to the legislature. From the whole purview of the statute, and a consideration of the manifest intention of the legis-

lature in framing it, and the absurd and harmful consequences of following strictly its letter, our construction of this statute is that competing propositions for new counties may be submitted at the same election, but only one can be adopted; and to secure such result it must receive not only a majority of the votes cast thereon, but also a plurality of the votes cast on the competing propositions; that is, it must receive a larger affirmative vote than any of its competitors or rival candidates for countyhood." *State v. Board of Commissioners*, 67 Minn. 352, 69 N. W. 1003. The same views are affirmed in *State v. Folk*, 89 Minn. 269, 94 N. W. 879.

mainder of Polk county would have been left in two parcels twelve miles apart. The court held that it was an implied condition that the new counties should be composed of contiguous territory and should be so carved out of the old county as to leave contiguous territory.⁴⁰ The court says: "This statute does not, in terms, require that the new counties shall be made up of contiguous territory, or that the territory left within the jurisdiction of the old county shall be left contiguous. The word 'county' is used in this statute in its usual and accepted meaning and in reference to the declared public policy of the state from its beginning, that all counties shall be composed of contiguous territory unless separated by navigable waters. The statute, then, must be construed so as to give to the word 'county' such meaning; and also with reference to the rule that general terms of a statute are subject to implied exceptions founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences. So construing this statute, the court holds that new counties which it authorizes to be created out of territory to be detached from a county already organized must be composed of contiguous territory, and the remaining part of the original county must be left one continuous portion of territory."

In a still later case under the same statute, it was held that only one proposition could be submitted at the same election to organize the same territory into a new county. In the case referred to three petitions were submitted at the same election to organize the same part of Polk county into a new county. Each petition proposed a different name for the new county, a different county seat and different men for the first board of county commissioners. The court held that the election was a nullity.⁴¹

A Nebraska statute on the same subject is given in the margin.⁴² Under this statute it has been held proper to

⁴⁰ Duckstad v. Board of County Commissioners, 69 Minn. 202, 71 N. W. 933. ⁴¹ State v. Larson, 89 Minn. 123, 94 N. W. 226.

⁴² "Whenever it is desired to form

submit several petitions at the same election, if the petitions do not conflict.⁴³ But if conflicting petitions are presented, it is held to be the duty of the county board or boards to submit the one first presented which complies with the law and to reject the others.⁴⁴

In Missouri it has been held that two propositions for the removal of a county seat may not be submitted at the same time.⁴⁵ Under a local option statute which allowed each county, city, town, district or precinct to decide for itself the question of license or no license, it was held proper to submit the question as to a county and as to a city within the county on the same day, and that if the result was different in the city, then the city would be excepted from the law of the county.⁴⁶

§ 720. Statutes giving new rights and remedies.—Where a statute creates a new right or imposes a new duty or liability, unknown to the common law, and at the same time gives a remedy for its enforcement, the remedy so prescribed is exclusive.⁴⁷ If no remedy is prescribed the

a new county out of one or more of the then existing counties, and a petition praying for the erection of such new county, stating and describing the territory proposed to be taken for such new county, together with the name of such proposed new county, signed by a majority of the legal voters residing in the territory to be stricken from such county or counties, shall be presented to the county board of each county to be affected by such division, and it appearing that such new county can be constitutionally formed, it shall be the duty of such county board or county boards to make an order providing for the submission of the question of the erection of such new county to a vote of the people of the counties to be af-

ected, at the next succeeding general election, of which the notice shall be given, the votes canvassed, and the returns made as in cases of election of county officers, and the form of the determination of such question shall be as follows: 'For new county,' and 'Against new county.' Sec. 10, art. 1, ch. 18, Campbell's Stat. of Neb. of 1887."

⁴³ State v. Newman, 24 Neb. 40.

⁴⁴ State v. Armstrong, 30 Neb. 492.

⁴⁵ State v. Garrett, 76 Mo. App. 295.

⁴⁶ Cole v. Commonwealth, 101 Ky. 151, 39 S. W. 1029.

⁴⁷ Baltimore & O. S. W. R. R. Co. v. Campbell, 109 Ill. App. 25; Cole v. Muscatine, 14 Iowa, 296; Hodges v. Tama County, 91 Iowa, 578, 60 N. W. 185; Harrington v. Glidden,

right or liability may be enforced by the appropriate remedy already provided.⁴⁸ Where a new remedy is given by statute, and there are no negative words or other provisions making it exclusive, it will be deemed to be cumulative only and not to take away prior remedies.⁴⁹ A statute gave to the plaintiff's attorney, in a court of record, a lien upon the plaintiff's cause of action from the commencement of the suit or entry of appearance, but made no provision for enforcing the lien. It was held that the lien would be enforced according to the general laws in regard to liens, and that the court should protect the attorney's lien in its judgment in the case.⁵⁰ "Where a statute, for the protection and benefit of individuals, prohibits a person from doing an act, or imposes a duty, if he disobeys the prohibition or neglects to perform the duty, he is liable to those for whose protection the statute was enacted for any damages resulting proximately from such disobedience or neglect."⁵¹

§ 721. Miscellaneous.—Although the word "citizen," used in its most common and comprehensive sense, includes women, yet an act providing for the admission of a citizen of proper residence, age and character to practice as an attorney has been held not to include women, because such

179 Mass. 486, 61 N. E. 54; *Abel v. Minneapolis*, 68 Minn. 89, 70 N. W. 851; *Clinton v. Henry County*, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415; *McGinnis v. Missouri Car & F. Co.*, 174 Mo. 225, 73 S. W. 586; *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401; *Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937, 20 Am. St. Rep. 760, 10 L. R. A. 393; *Multnomah County v. Kelley*, 37 Ore. 1, 60 Pac. 202; *Madden v. Lancaster County*, 65 Fed. 188, 12 C. C. A. 566, 27 U. S. App. 528.

⁴⁸ *McArthur v. St. Louis Piano Co.*, 85 Mo. App. 525; *Illinois Cent. R. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041.

⁴⁹ *Mackin v. Haven*, 88 Ill. App. 434; S. C. affirmed, 187 Ill. 480, 58 N. E. 448; *Harper v. Mangel*, 98 Ill. App. 526; *Barry v. Lancy*, 179 Mass. 112, 60 N. E. 395; *Clark v. Lancy*, 178 Mass. 460, 59 N. E. 1034; *State v. Edwards*, 163 Mo. 660, 63 S. W. 388; *Walsh v. Association of Master Plumbers*, 97 Mo. App. 280; *May v. Anaconda*, 26 Mont. 140, 66 Pac. 759; *Van Tassell v. Derrensbacher*, 56 Hun. 477, 10 N. Y. S. 145; *Danville State Hospital v. Belleforte*, 163 Pa. St. 175, 29 Atl. 901.

⁵⁰ *Illinois Central R. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041.

⁵¹ *Baxter v. Coughlin*, 70 Minn. 1, 72 N. W. 797.

construction would be a departure from the antecedent policy of the legislature, and introduce a fundamental change in long-established principles.⁵² Courts will be very reluctant to overturn them, or essentially modify them by extending the operation of a dubious statute. But women are held eligible to admission to the bar in Colorado.⁵³ Where school directors were required to be citizens of the United States, resident taxpayers and qualified voters, a woman is not eligible, because not a qualified voter.⁵⁴ Where the only qualification required for the office of clerk of the county court is citizenship, a woman was held to be eligible.⁵⁵

Statutes requiring railroads to fence their tracks, though literally applicable to the entire right of way, are held not to require fences around depots and station grounds.⁵⁶ Where such a statute provides that a barbed wire fence, constructed in a particular manner, shall be deemed a good and sufficient fence, it does not mean that no other will answer.⁵⁷ A statute requiring railroad companies "to construct and maintain cattle-guards, where fences are required, sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad," must receive a reasonable and common-sense construction and does not require guards that will turn stock under all circumstances, but such as will ordinarily do so.⁵⁸

Christian science⁵⁹ and osteopathy⁶⁰ have been held to be the practice of medicine within an act regulating such prac-

⁵² Robinson's Case, 131 Mass. 376; O. R. R. Co. v. Thompson, 101 Tenn. 197, 47 S. W. 151.

Bradwell's Case, 55 Ill. 535; Goodell's Case, 39 Wis. 232; Bradwell v. State, 16 Wall. 130, 21 L. Ed. 442. See Opinion of Justices, 136 Mass. 578.

⁵³ In re Thomas, 16 Colo. 441, 27 Pac. 707, 13 L. R. A. 538.

⁵⁴ State v. McSpaden, 137 Mo. 628, 39 S. W. 81.

⁵⁵ State v. Hostetter, 137 Mo. 636, 39 S. W. 270.

⁵⁶ Railroad Co. v. Hughes, 94 Tenn. 450, 29 S. W. 723; Mobile &

⁵⁷ Perrault v. Minnesota, etc. R. Co., 117 Wis. 520.

⁵⁸ Cole v. Chicago, B. & Q. R. R. Co., 47 Mo. App. 624.

⁵⁹ State v. Buswell, 40 Neb. 153, 57 N. W. 1019. *Contra*, State v. Mylod, 20 R. I. 632, 40 Atl. 753.

⁶⁰ Bragg v. State, 134 Ala. 165, 32 So. 767; Little v. State, 60 Neb. 749, 84 N. W. 257.

tice. The practice of dentistry was held not to be the practice of medicine within the Rhode Island act.⁶¹ So a licensed dentist was held not to be a practitioner of medicine within an act exempting such practitioners from jury duty.⁶²

A statute provided that any person who shall kill or destroy any coyote or coyotes shall be paid a bounty of \$5 out of the general fund in the state treasury for each coyote so destroyed. It was held not to be an appropriation but only a promise.⁶³ The following statutes were held not to amount to an appropriation within the meaning of the constitution: That all accounts for the penitentiary shall specify the items, be certified by the superintendent and presented to the secretary of state, who shall audit the same and issue warrants on the treasurer for the payment thereof;⁶⁴ that the salaries of the governor, secretary of state and other officers of the state shall be paid quarterly out of the treasury of the state, upon the warrants of the secretary of state, commencing from and after they enter upon the duties of their respective offices;⁶⁵ that the inspector of mines shall receive a salary of \$3,500 and certain mileage, "to be paid monthly by the state treasurer out of any moneys appropriated for that purpose."⁶⁶

A stock law provided that on petition the question of stock running at large should be submitted to vote in the territory specified in the petition and that there should be but one election under the act in any one year. It was held that, where there had been an election in a given district, there could not be another within a year embracing any part of the same territory.⁶⁷ Where a local option law for-

⁶¹ *State v. Beck*, 21 R. I. 288, 43 Atl. 366, 45 L. R. A. 269.

⁶² *State v. Fisher*, 119 Mo. 344, 24 S. W. 167.

⁶³ *Ingram v. Colgan*, 106 Cal. 113, 38 Pac. 315, 39 Pac. 439, 46 Am. St. Rep. 222, 28 L. R. A. 187.

⁶⁴ *Crossman v. Kincaid*, 31 Ore. 445, 49 Pac. 764.

⁶⁵ *Shattuck v. Kincaid*, 31 Ore. 379, 49 Pac. 758.

⁶⁶ *Goody Koontz v. Acker*, 19 Colo. 360, 35 Pac. 911. See *Prime v. McCarthy*, 92 Iowa, 569, 61 N. W. 220.

⁶⁷ *Reed v. State*, 136 Ala. 91, 34 So. 348.

bade an election within the same limits in less than two years after an election therein under the act, it was held not to forbid another election within part of the same territory.⁶⁸

A statute authorizing or requiring municipalities to publish their proceedings, means publication in the English language only unless otherwise specified.⁶⁹ A statute which provides that, where two railroads cross each other, trains must be brought to a stop, applies to an electric railway between two cities.⁷⁰ Where a statute made the abutting owner liable for the expense of repairing the sidewalk in front of his property, if he neglected to repair it himself, it was held to impose on such owner the duty to make such repairs and therefore to make him liable over to the city for an injury by reason of such neglect.⁷¹ A federal statute is a rule for all and is not to be construed with reference to the conditions in one state alone.⁷² A statute required a will to be attested in the presence of the testator. It was held to be a good attestation within the statute, where the witnesses signed the will at a table in a room adjoining that where the testator sat in bed, but which was done out of sight of the testator, though he might have seen the witnesses at the table by moving three feet in bed, and where the witnesses, immediately after signing, brought the will to the testator and showed him their signatures.⁷³ A statute regulating the rates of common carriers provided that for a violation of its provisions the carrier should, on conviction, be *fined* a certain amount. It was held that the penalty must be enforced according to the criminal code

⁶⁸ *Ex parte Brown*, 35 Tex. Crim. App. 443, 34 S. W. 131.

⁶⁹ *State v. Trenton*, 56 N. J. L. 469, 29 Atl. 183; *State v. Jersey City*, 54 N. J. L. 437, 24 Atl. 571.

⁷⁰ *Louisville & N. R. R. Co. v. Anchors*, 114 Ala. 492, 22 So. 279, 63 Am. St. Rep. 116.

⁷¹ *Chester v. First National Bank*, 9 Pa. Supr. Ct. 517.

⁷² *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 21 S. C. Rep. 885, 45 L. Ed. 1200.

⁷³ *Cunningham v. Cunningham*, 80 Minn. 180, 83 N. W. 58, 81 Am. St. Rep. 256. To same effect, *Cook v. Winchester*, 80 Mich. 581, 46 N. W. 106. But see *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368.

and not in a civil action.⁷⁴ And generally, in the absence of any special provision as to the mode of procedure, the use of the word "*fine*" determines the form of remedy.⁷⁵

⁷⁴ State v. Missouri Pac. Ry. Co., 64 Neb. 679, 90 N. W. 871. The court says: "Every transgression of the section quoted is characterized as an 'offense,' the means by which the law is to be enforced is described as a 'prosecution,' the verdict is called a 'conviction,' and the judgment a 'fine.' These words abound in the criminal code and they are associated in popular thought with laws for the prevention and punishment of crime.

They are used in the statute as signs of ideas; their office was to describe what was passing in the legislative mind, and they show conclusively, it seems to us, that the legislature was not thinking of either civil law or civil remedies. The legislative thought was not cast in the mould of the criminal law by accident."

⁷⁵ State v. Marshall, 64 N. H. 549; State v. Horgan, 55 Minn. 183, 56 N. W. 688.

INDEX.

The references are to sections: Vol. I, §§ 1-308; Vol. II, §§ 309-731.

ABATEMENT—

of action, how prevented, by liberal construction of statute of limitations, in case of death or marriage of party, 702.

ABSURDITY—

arguments based on, out of place against plainly expressed intention, 367, 490.

general words may be restricted to avoid, 376, 408, 584.

literal construction may be departed from to avoid, 489, 490.

and if ambiguous or uncertain, will be avoided by construction, 490.

ACCESSION TO OFFICE—

courts take judicial notice of, 462.

ACCOUNT—

against county, held to mean any claim for money, 400.

ACQUIESCENCE—

in validity of statute, effect of, 82.

ACT—

definition of, 67, 68.

ACTION—

retrospective vesting of title presumed not intended to affect pending action, 258.

plaintiff should have title at commencement of, 258.

statutes regulating procedure apply to pending, 674.

statutes for limitation of, how construed, 702-708.

ACTUS NON FACIT REUM NISI MEUS SIT REA, 526, 527.

ADMISSIONS—

court will not act on admissions of parties as to facts touching validity of act, 49.

ADOPTION—

of statute from another state adopts construction, 404.

of statute by reference, 405-407.

AFFIDAVIT—

when required of a party may be made by attorney of corporation, 596.

statutory direction to verify assessment roll by, directory, 624.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

AFFIRMATIVE STATUTES —

what are, 331, 333.

their operation, 331-333.

how form affects construction as to being directory or mandatory, 611.

AGGRIEVED —

in statute, construed, 400.

AMBIGUITY —

in public grants resolved in favor of government, 548-553.

AMENDATORY ACTS —

constitutional regulations, 230, 232.

they are mandatory, 230.

purpose of, 230.

require re-enactment of amended section, 231.

not necessary to restate old act or section amended, 231.

an erroneous recital of it, surplusage, 231.

requisites of amendatory act, 231.

amendments by implication not within constitutional provision, 239.

acts complete in themselves are valid, though they amend other acts by implication, 239.

whether act amendatory within the constitution, 240.

effect of amendment of a repealed or void section or act, 233.

a section amended to "read as follows," 237.

repeals what is not embraced in amended form, 237.

new matter thus introduced operates only from the taking effect of amendatory act, 237.

old matter re-enacted is continued in force without interruption, 237, 238, 273.

operates prospectively by virtue of re-enactment, 237.

repeal of amendatory act repeals same matter in amended act, 237.

general words of time construed distributively, 237.

how statute amended operates prospectively, 237.

constitutional regulation may apply to independent act which is intended to be amendatory, 239.

implied amendments by independent acts, 239.

not within the mischief intended to be remedied, 239.

nor is a statute which furnishes a rule of construction, 239.

nor one referred to for procedure, 239.

of two constructions warranted by the words, that will be adopted which best harmonizes with the general tenor and spirit of amended act, 489.

special charters may not be amended when special legislation forbidden, 229.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

AMENDATORY ACTS (continued) —

- effect of second amendment of section which ignores prior amendment of same section, 234.
- whether clause or subdivision of section may be amended without setting forth whole section, 235.
- effect of discrepancy between amendment specified and section as amended, 236.
- effect of repeal on re-enactment, 238.
- miscellaneous cases and questions in regard to amendatory acts, 241.

AMENDMENTS —

- admissible during process of enactment of bill, 54.
- must be germane to subject of bill, 54.
- concurrence in, made by other house, does not require yeas and nays, 54.
- construction of remedial statute for, of records of courts, 595.
- of bills after time for introducing bills has expired, 66.
- made or rejected may be taken into consideration in construing act, 470.

“AND” AND “OR” —

- construction of, 397.

ANIMALS —

- right to detain trespassing until charges paid, etc., strictly construed, 571.

APPEAL —

- effect of repeal of statute giving jurisdiction pending appeal, 285.
- right of, may be taken away pending appeal, 285.
- may include writ of error, 400.
- right of, to one who thinks himself aggrieved, not extended to default judgment, 506.
- notice to give effect to limitations for, 545.
- statutes limiting time for taking, how construed, 545.
- statutes prescribing method of, strictly construed, 567.
- when recognizance required of appellant by statute, how construed as to corporations, 597.
- provision as to filing transcript held directory as to time, 616.
- no vested right in, 672.
- statutes liberally construed which give a right of, 717.

APPROPRIATION —

- of money, what constitutes, 721.

APPROPRIATION ACT —

- provisions in, presumed to have temporary effect like the act itself, 347.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 303-721.

APPROVAL —

of statutes by executive, 60.

ARBITRATION —

statutes providing for and regulating, liberally construed, 575, 685.

ASSESSMENT —

affidavit to verify, not imperative, 624.

ASSIGNMENTS —

for benefit of creditors, statutory regulations concerning, to prevent fraud, mandatory, 633.

ASSOCIATED WORDS —

effect of, in construction, 414-419.

ATTACHMENT —

statute giving writ of, strictly construed, 566, 694.

and to be strictly followed, 566, 694.

rights acquired by, whether vested, 676.

ATTORNEYS-AT-LAW —

females not eligible by construction of the general word "citizen," 487.

acts allowing attorney's fees in particular cases, whether special or class legislation, 226.

AUTHORITY —

statute should, if possible, be so construed as to bring it within the legislative power, 599.

BASTARDS —

acts legitimating, liberally construed, 681.

BALLOT LAWS —

how construed, 709.

BICYCLE —

held not a wagon, 400, see **WAGON**.

BILL (see STATUTES).

definitions, 67, 68.

BILL OF EXCHANGE —

includes check, 400.

BLACKSTONE, SIR WM.—

his views of the union of the fundamental powers, 2.

BOARD OF SUPERVISORS —

statute requiring signing record of their proceedings, directory, 623.

BONA FIDE PURCHASERS —

statutes for the protection of, and creditors, not applicable to others, 602.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

BOUNDARIES —

courts take notice of boundaries of state, 462.

BOUNTY —

liberal construction of, 681.

BRIDGE —

franchise to build not construed to be exclusive, 549.

grant of right to build does not include right to obstruct navigation, 558.

power to municipal corporation to lay out highways does not include right to obstruct navigation by, 558.

BROTHERS AND SISTERS —

in statute, usually include those of half blood, 400.

BUILDING AND LOAN ASSOCIATIONS —

special and class legislation in respect thereto, 222.

BUILDING MATERIAL —

regulations concerning, in fire limits, mandatory, 633.

BURDEN —

statute imposing, or exempting from common, strictly construed, 535-541.

BY-LAWS —

not judicially noticed, 460.

penalty of, may be incurred without criminal mind, 527.

CALENDAR —

courts take notice of, 465.

CASUS OMISSUS —

can never be supplied by court, 605, 609.

not the province of courts to supply defective enactments, 606.

act providing for companies to make and supply gas does not authorize them to supply natural gas, 609.

CENSUS —

courts take judicial notice of the results of, when official, 462.

CERTIORARI —

statute granting, liberally construed, 717.

CHARGE TO JURY —

remedial provision for filing of record, 688.

requirement to be in writing, how construed, 620.

CHARTER —

of corporation, serves twofold purpose; to create and define the agreement between members, 555.

is the measure of the corporate powers, 555.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

CHECK —

is a bill of exchange, 400.

CHILD —

how construed, 400.

includes grandchild, 400.

illegitimate, when entitled to statutory rights granted to, 710.

a minor full grown held not a "child," 377.

CHRISTIAN SCIENCE —

whether practice of medicine, 400, 721.

CITIZEN —

definition of, 400.

whether includes women, 721.

comprehensively understood includes females, but they may be excluded in considering existing laws and their policy, 487.

CITY —

may include village or town, 400.

CIVIL DAMAGE ACTS (see INTOXICATING LIQUORS).

construction of, 695-700.

CLAIM —

definition of, 400.

CLASS LEGISLATION —

what is, 202-228.

CLUB —

held not to be a tippling house, 525.

CLERK —

meaning of, in statutes, 400.

CLASSIFICATION —

of statutes, 334-338.

CLASSIFICATION OF SUBJECTS FOR LEGISLATION —

whether act void as special or class legislation depends on the classification adopted by the act, 202.

general principles of classification for legislative purposes, 203.

classification of municipalities according to population — California, 204.

same — Minnesota, 205.

same — Missouri, 206.

same — New Jersey, 207.

same — Ohio, 208.

same — Pennsylvania, 209.

same — other states, 210.

for what purposes the classification of municipalities is permissible, 211.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

CLASSIFICATION OF SUBJECTS FOR LEGISLATION (continued)—

whether municipalities under special charters may constitute a class, 212.

other classification of municipalities, 213.

classification based solely on existing or past conditions, 214.

validity of class not dependent upon number, 215.

evasive classification, 216.

classification of counties by population or otherwise, 217.

classification and the question of special or class legislation considered with reference to the following subjects:

schools, school districts and school affairs, 218.

railroads, 219.

courts and judicial procedure, 220.

insurance and insurance companies, 221.

building and loan associations, 222.

wages—labor—employees, 223.

mines, 224.

Sunday laws, 225.

allowing an attorney's fee in particular cases, 226.

criminal laws, 227.

miscellaneous acts, 228.

CODE—

adoption of, by reference, 75.

resort to original acts in construction of, 450, 451.

COLONIAL LAWS, 18, 19.

COLONISTS—

right of, to laws of mother country, 16.

the force and nature of such laws, 17.

what English statutes brought by, to this country, 16, 17, 326.

English statutes passed after establishment of colonies, 18.

COMITY—

as to effect of foreign laws, 13.

transitory rights enforceable subject to principles of, 14.

foreign law considered by, 312, 316, 317.

COMMITTEE REPORTS—

to legislature, may be considered in construing act, 470.

COMMODITY—

definition and construction of, 400.

COMMON COUNCIL—

being granted power to judge of the election of its members does not oust the courts of jurisdiction, 552.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

COMMON COUNCIL (continued)—

acts prohibiting members being interested in contracts, business, etc., of municipality, 444.

mandatory provisions governing proceedings by, 631.
giving power, and permissive in form, 636-639.

COMMON LAW (see COLONISTS).

to what extent in force in this country, 16-19.

act mitigating rigorous rule of, relative to ship-owners, how construed, 681.

statutes in derogation of, strictly construed, 248, 454, 573, 579.

if remedial, liberally construed, 573-575.

when a statute changes a common-law offense, it is still a common-law offense, 251.

it is repealed when a statute defines and enacts a common-law offense and prescribes a penalty, 251.

how affected by statute and its repeal, 294.

statutes declaratory of, construction and effect, 329, 330.

words having definite sense in the, to be construed by, 398, 455.

"heir," one capable of inheriting; "actions," "suit," "final judgment," "party," 395.

rules of interpretation derived from, 453.

its part in our jurisprudence, 453.

not presumed the legislature intends to make innovations upon, beyond necessity, 454.

statutory lien has common-law incidents, 454.

available to furnish means to effectuate a statute, 455.

statute in affirmance of, construed by, 455.

statutes in amendment of, construed in light of, 455.

courts take notice of, 459.

COMMUNIS ERROR FACIT JUS —

when may be invoked, 474, 476.

COMPENSATION —

for land taken for public use to be sought according to statute, 571.

acts giving, to persons whose property taken compulsorily, 680.

COMPETITIVE BIDDING —

requirement to let contract by, under municipal charter, imperative, 631.

sealed bids, and opening of, 632.

COMPUTATION OF TIME —

general rule of computing time consisting of days, weeks, months or years, 184.

the period consists of entire days, 184.

when fractions of a day recognized, 179.

The references are to the sections: Vol. I, §§ 1-808; Vol. II, §§ 309-721.

COMPUTATION OF TIME (continued) —

when computation from an act done or date, the day of that act or date excluded, 185.

"from," is a term of exclusion, 185.

the words "to," "till" or "until" inclusive, 185.

the first day excluded, and the last included in computing the period, 185.

computation, when a summons or notice required to be served a given number of days, 186.

where right to be exercised within a determinate period, 187.

when Sundays included or excluded, 188.

CONDITION —

if act forbidden except on, and condition is impossible, the prohibition is absolute, 351.

CONGRESS —

has only delegated powers enumerated, 5, 81.

their scope, 22, 23.

power to legislate for territories, 24.

CONSEQUENCES —

courts have no concern with, when the law is plain, 490.

it is then their simple duty to execute it, 490.

CONSTITUTION (see **AMENDATORY ACTS**; **CONTRACTS**; **EX POST FACTO LAWS**; **GENERAL, SPECIAL AND LOCAL LAWS**; **OBLIGATION OF CONTRACTS**; **RETROSPECTIVE LAWS**; **TITLES OF STATUTES**; **VESTED RIGHTS**) —

is a limitation, 81.

the great charter of republican government, 2.

the organic and paramount law, 2.

defines and divides the governmental powers, 2.

separation of legislative, executive and judicial powers, 2-7.

requirements as to legislative procedure mandatory, 26, 27, 44, 45, 67-78.

provisions as to extra sessions of legislature, 65.

limitation of time for introduction of bills, 66.

does not prevent amendments or substitutes, 66.

limitation of length of legislative session, 66.

provisions as to enacting style, 69-73.

as to titles and subjects of statutes, 109.

generally regarded as mandatory, 112-114, 190.

mischief intended to be cured, 111.

liberally construed to aid legislation not within mischief, 115, 127-130.

provision forbidding amendment of bill so as to change its original purpose, 80.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

CONSTITUTION (continued)—

- statutes construed so as not to conflict with, 83.
- statutes not void because opposed to spirit of, 85.
- delegation of legislative power, 87-105.
- change of, when does not affect existing legislation, 107.
- provisions as to amendment of statutes and their construction, 131-135.
- provisions as to time of statutes taking effect, 176, 177.
- emergency clause in statutes, 176, 177.
- prohibition of special and local laws, 189.
- requirement of general laws, and their uniform operation, 189.
- whether general laws can be made applicable is a legislative question, 190.
- if a general law exists, that question answered, 191.
- imperative to pass only general laws on enumerated subject, 191.
- provision against revival of law by reference to title, 242.
- provisions against adopting or extending the provisions of an act without re-enacting them at length, 243.
- repealing effect of unconstitutional statute, 245.
- effect of provisions requiring general laws and laws of uniform operation upon repeal by implication of special by general laws, 279.
- provisions as to repeals, 289.
- when statutes repealed by constitution, 290.
- whether statutes void in part are void *in toto*, 296-303.
- applications of general words of statute denied or excepted when unconstitutional, 503.
- construed as prospective, 642.
- construction of provisions forbidding retrospective or retroactive laws, 648.

CONSTRUCTION (see LIBERAL CONSTRUCTION; STATUTES; STRICT CONSTRUCTION) —

- of foreign statute, 13.
- of federal statutes by federal court binding on state courts, 22.
- of state laws by state courts followed by federal courts, 22, 314, 315.
- when act provides for things to be done before it takes effect, 182.
- meaning of words "now," "heretofore," "hereafter," "from and after the passage of this act," etc., 183.
- as to the computation of time, 184-188.
- statutes construed against repeal by implication, 247-268.
- re-enactment of statutes to prevent implied repeal, 247, 258.
- title by entireties not abolished by statute giving married woman control of her separate estate, 264.
- when general and a particular intent expressed, latter prevails, 268, 275, 276, 345, 351.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

CONSTRUCTION (continued) —

- statute to take effect at a future day, how construed, 280.
- of re-enacted statutes, 273, 288.
- of repealing statutes, 288.
- reference had to pre-existing law in construction of revision, 282.
- of saving clauses and saving statutes, 287.
- of express repeals, 292, 293.
- of statutes void in part, 296-308.
- courts will take judicial notice of facts that affect the validity, operation or construction of statutes, 310.
- of public and private statutes contrasted, 328.
- of declaratory statutes, 329, 330.
- of affirmative and negative statutes, 331-333.
- liberal, of remedial statutes, 336.
 - how qualified by other rules of construction, 336.
 - as where punitive compensation for wrong, 337.
- strict, of certain statutes of remedial nature, 336.
 - ✓of penal statutes against accused, 337.
 - ✓of statutes in derogation of common law, 336.
 - of statutes for taking private property for public use, 336.
 - authorizing summary proceedings, 336.
- more or less strict according to severity of penalty, 337.
- ✓use of title of statute in, 339, 340.
- effect of constitutional restriction to one subject expressed in title, 340.
- ✓language of act to be construed in view of title, 339, 340.
- ✓value of preamble for, 341, 342, 389.
- one part of statute to be construed with another, 344.
- presumed all parts intended to harmonize, 344.
- general words may be qualified by expression of particular intent, 345.
- general act may be limited by exceptions, provisos, etc., 345.
- partial conflict may cause an exception, 346.
- not allowed to revoke or alter a statute when words may have proper effect without, 346.
- contradictions, however, cannot stand together, 346.
- statute itself furnishes the best means of its own exposition, 348.
- when intention thus ascertained it will prevail, 348.
- ✓of words and phrases, 347, 348.
- of conflicting provisions in same act, 268.
- effect of total conflict between two parts of acts, 349, 350.
- a statute should be construed as a whole with reference to the whole system of which it is a part, 348.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

CONSTRUCTION (continued) —

- ✓effect of provisos, exceptions and saving clauses, 351.
 - what they qualify, 351.
 - presumption that what is excepted would otherwise be within purview, 351.
 - proviso strictly construed, 352.
- ✓the intention of provisions qualified by provisos, saving clauses, etc., to prevail, 350, 357.
- legislative, has weight, 358.
- compared with interpretation, 365.
- object of, to ascertain intent, 363, 364.
- intent first sought in language of act, 366.
- if intent plainly expressed, it is to be followed without further inquiry, 367.
- entire statute to be considered in ascertaining intent, 368.
- general intent of statute a key to meaning of parts, 369.
- intent of whole act controls interpretation of parts, 370-373.
- flexibility of words and phrases to harmonize with general intent, 374, 375.
- literal sense not controlling, 376-379.
- to depart from literal, what two things necessary, 367.
- effect to be given to every part, 368, 369, 380.
- inconsistent expressions to be harmonized, 368, 410-413.
- statute to be construed as a whole and so as to accomplish the legislative intent, 368-379.
- some effect, if possible, to be given to every word, clause and sentence, 380.
- words enlarged or restricted to carry out intent, 381.
- ✓ words deemed inserted to carry out intent, 382.
- one word substituted for another, 383.
- words disregarded or eliminated, 384.
- implied exceptions to general language, 385.
- transposition of words and phrases, 386.
- particular and general intent, 387.
- there can be no intent of a statute not expressed in its words, 388.
- of words and phrases, 389-400.
 - general rules, 389.
 - should be construed as they are generally understood, 390.
 - meaning of, for the court — sources of information, 391.
 - technical words, 393.
 - words having both popular and technical meaning, 394-396.
 - use of "or" and "and," 397.
 - words having a special sense in the common law, 398.
 - statutory use of words, 399.
 - of particular words and phrases, 400.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

CONSTRUCTION (continued) —

- of re-enacted statutes, 399, 401-403.
- of statutes adopted from other states or jurisdictions, 404.
- of statutes adopted by general reference, 405-407.
- of statute incorporated in another, 405-407.
- of words of reference, 405-407.
- with reference to grammatical sense, 408, 409.
- should receive reasonable and common sense, 409.
- mistakes may be corrected by, 410-413.
 - mistaken reference may be corrected by context, 410-413.
 - where one word has been used for another, or omitted, 410-413.
 - the strict letter is thus made to yield to the intention, 410-413.
- meaningless words may be eliminated by, 410-413.
- to supply omitted words, or read statute in different words, intent must be clearly expressed, 410-413.
- maxim noscitur a sociis* and its application, 414-419.
- of associated words, 414-419.
- of relative and qualifying words and phrases, 420, 421.
- when general words follow particular, 422-441.
- doctrine of *ejusdem generis* and its application, 422-481.
- reddendo singula singulis*, 442.
- of statutes *in pari materia*, 443-449.
- with reference to the common law, 453-455.
- regulations on a given general subject will extend to new class of same subject subsequently added, 444.
- and exceptions in such regulations will apply, 444.
- doubtful provisions not to be construed to conflict with general principles, 447.
- resort to original acts in construction of revisions and codifications, 450, 451.
- repealed and invalid statutes may be considered in construing statute, 452.
- extrinsic facts, which are supposed to have been known to legislature, not provable to aid, 462.
- documents for, to be read in view of surrounding facts, 471.
- any document equally authentic as a statute in which the objects of a statute are made known may be referred to, 471.
- journals of convention referred to to learn intention of words in constitution, 470.
- of legislature for like purpose, 470.
 - or history of enactment, 471.
 - or to see if duly passed, 471.
- declarations of members of legislature as aid to construction, 470.
- contemporaneous, when invoked, 472.

The references are to the sections: Vol. I, §§ 1-338; Vol. II, §§ 309-721.

CONSTRUCTION (continued) —

- statutory, prospectively conclusive, 472.
- when acted on by inferior courts, 472.
- when decision conflicting, 472.
- effect of general usage on, 473.
- local differences in construction of general statutes disregarded, 473.
- whether may take into consideration proceedings in legislature, 470.
- amendments, debates and committee reports, 470.
- opinions of members of legislature as to purpose of act, 470.
- surrounding facts and conditions, 471.
- mischief to be remedied, 471.
- general usage and practical construction, 473-478.
- practical, by those for whom law enacted not lightly questioned, 474.
- effect of in interior department of the general government, 474.
- of state and county officers, 474.
- should be adhered to, 475, 479-486.
- with reference to effects and consequences, 487-490.
- presumed not intended to affect existing institutions, systems and policies any further than the terms of the statute require, 487.
- ought to be reasonable if the words will permit, 488, 490.
- so that public and private rights are not infringed, 488-490.
- considerations of what is reasonable, convenient, causes hardship or injustice have weight, 488, 489.
- pernicious consequences will be avoided by, if possible, 488.
- presumed that legislature intend every part of a law to have effect, 491.
- that statutes passed from good motives, 496.
- that facts necessary to validity of statute existed, 497.
- that the legislature did not intend a vain thing, 497.
- or to violate the constitution, 497.
- acts deemed to refer and apply to persons and things within the state and within the power of the legislature, 513.
- whether state or public corporation embraced by general words of statute, 514.
- effect of mistake of legislature as to existence, application or effect of a statute, 515.
- the same rules of construction apply to constitutions as to statutes, 516.
- statutes should be construed so as to give a sensible effect to every part, 516.
- and so as to avoid absurd and unjust consequences, 516.
- and to conform to public policy of a state, 516.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

CONSTRUCTION (continued) —

- strict and liberal compared, 517-519.
- strict, not precise converse of liberal, 518, 519.
 - does not admit of expansion beyond letter, 518, 519.
- strict, varies according to gravity of consequences, 518.
- strict, results from many rules of, 518.
- strict, consistent with effect to carry out intention, 519-521.
- strict, of penal statutes. 520-527.
- of revenue laws, 535, 538, 541.
- exemption from taxation and other common burdens, 539.
- penal statutes cannot be extended beyond their letter by, 521.
 - cases within the policy or mischief of statute excluded if not within the letter, 521-523.
- strict, does not preclude the application of common sense, 521-528.
- most favorable to accused to be adopted, 537, 524.
- statutes against common right, 542, 543.
 - of limitations, 544.
 - as to new trials and appeals, 545.
 - interfering with legitimate industries, 546.
- of acts creating municipal corporations or granting powers thereto, 551-553.
- of public grants, 548-550.
- delegation of power, 551-558.
- of statutory rights, 570, 571.
- statutes in derogation of the common law, 573-575.
- interpretation clause authoritative, 576.
- contemporaneous legislative construction high evidence of intention, 576.
- so far as it professes to declare the past or present meaning of statute, not binding on the courts, 576.
- policy of law, how considered for, 581.
- liberal, 582-609.
- equitable construction, 587, 588.
 - as to being directory or mandatory, 610-640.
- of acts as prospective or retrospective, 642-643.
- retrospective laws strictly construed, 335.
- opposed to giving retrospective effect, 642.
 - or to affect existing rights, 642, 643.
 - or to create new obligations, 642, 643.
- acts relating to rights of husband and wife construed as prospective, 644.
 - as to being *ex post facto*, 649-659.
 - as to impairing obligation of contracts, 660-670.
- of remedial statutes, 336, 679-684.

The references are to the sections: Vol. I, §§ 1-808; Vol. II, §§ 809-721.

CONSTRUCTION (continued) —

- of provisions in favor of tax-payers, 680.
 - in favor of those affected by proceedings in derogation of common right, 680.
 - for protection of officers, 681.
 - married women, 681, 711.
- of acts for accomplishment of public objects, 682.
- strict, will not be given to penal laws which are declared by the statute to be remedial, 684.
- of statute of frauds, 600.
 - to prevent delays in obtaining judgment, 686.
 - relative to arbitrations, 685.
 - giving right of appeal, 717.
 - extending elective franchise, 680.
 - taking away penalties, 680.
 - providing compensation to parties whose property compulsorily taken, 680.
- of mechanics' lien statutes, 690, 691.
- of other lien laws, 692.
- of exemption statutes, 693.
- of attachment and garnishment statutes, 694.
- of statutes creating liabilities, 696-700.
 - for costs, 718.
 - causing death, 710.
 - discharging insolvent debtors, 547.
 - granting exemptions from execution, 693.
 - allowing recoveries for damages resulting from intoxication, against sellers, etc., 695-700.
- of statutes against selling liquor to minors, 701.
- of statute of limitations, 702-708.
- of old statutes re-enacted after having received a construction, 702.
- when statute has made no exception the courts can make none, 705.
- of statutes giving an action for wrongful death, 710.
- of election and ballot laws, 709.
- of married women's acts, 711.
- of other acts relating to husband and wife, 712.
- of game laws, 713.
- of acts relating to the fees, compensation, election, etc., of public officers, 714.
- of statutes requiring majority vote, 715.
- of words and provisions relating to time and its computation, 716.
- of statutes for the organization of new counties and the like as respects conflicting petitions, 719.
- a federal statute a rule for all and not to be construed by conditions in one state, 721.
- miscellaneous points in the construction of statutes, 516.

The references are to the sections: Vol. I, §§ 1-303; Vol. II, §§ 309-721.

CONTEMPORANEOUS CONSTRUCTION —

what is, 472-478.

when invoked, 472.

length of time continued important consideration, 477.

has implied judicial, legislative and popular sanction, 472, 474.

where statute doubtful, effect of long construction by inferior courts, 472.

of constitution, long acquiesced in, 472.

by official usage, 474.

judicial interpretation, 475.

CONTEMPT —

power to punish for, judicial, 4.

inherent in courts, 4.

may not be exercised by legislative or executive officers, 4.

CONTEXT —

may serve to engraft an exception to general words by implication, 345.

to restrict general words, or expand them, 345.

words expanded or limited to agree with general intent, 347.

statute itself furnishes the best means of its own exposition, 348.

to restrict general words, or expand them, 368-381.

words expanded or limited to agree with general intent, 366-376.

statute itself furnishes the best means of its own exposition, 366, 370.

when the words not certain, intent may be collected from context, etc., 370.

may modify meaning and effect of words of absolute repeal, 371.

and of particular words and expressions, 371.

may show the word orphan to mean minor, 371.

jury merely a credible person, 371.

birds not live animals, 371.

may show intent that limited expression shall be expanded, 374, 375.

to be consulted to learn in what sense words intended to be used, 376.

will not change effect of words contrary to intent, 376.

popular meaning of words accepted unless contrary intention appears by, 394.

otherwise when the context shows different intention though a general statute directs that the popular meaning be followed, 395.

"and" and "or" used indifferently, unless other intent indicated in, 397.

effect of, showing repeated use of same words, 395, 399.

The references are to the sections: Vol. I, §§ 1-303; Vol. II, §§ 309-721.

CONTEXT (continued) —

- available to correct mistakes, 410-413.
- effect of associated words, 414-419.
- effect of, when general words follow particular, 422-441.

CONTRACTS —

- illegal when in contravention of law, 502, 503.
- may be valid though contravening revenue regulations, 503.
- obligation of, defined, 660, 666.
- what are, within prohibition of laws impairing obligation of, 661, 669.
- certain laws part of, 660.
- state, like a natural person, bound by its contracts, 661.
- municipal charters not, 662.
- charters giving bounties, patents and copyrights are, 662.
- may be validated by statute, 663.
- of state, protected from impairment like those of private persons, 664.
- how its contracts may be impaired, 664.
- may be validated but not so as to affect rights of third parties, 675, 676.
- if a contract a nullity it cannot be made good by subsequent legislation, 671.
- when may be made good by statute, 675-677.

CONTRADICTIONS —

- cannot stand together, 346.
- how resolved where general provision, applicable to multitude of subjects, antagonized by another, applicable to a part of those subjects, 346.
- considerations of reason and justice have weight in adjusting such conflict, 346.
- effect of analogies in such case, 346.
- effect of total conflict, 349.
- effect of, by provisos and saving clauses, 350.

CONVENIENCE —

- argument based on, forcible, 267.
- out of place against plainly expressed intention, 367.
- considered in construction of statutes, 488, 490.
- argument upon, has no force when the law is plain, 491, 498.
- presumption that inconvenience, injustice and absurdity not intended, 498.
- acts remedial when intended to promote public, 689.

CONVICTION —

- can be none for offense unless the law violated be in force, 286.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

CONVICTS —

title of acts relating to, 168.

CORPORATIONS —

title of acts creating, regulating or pertaining to, 147.

established by public law, judicially noticed, 459.

confined in their action to powers granted, 380.

municipal, vested with portion of governmental authority, 551.

confined in their action to powers granted, 551.

grants to, whether public or private, strictly construed, 551, 557.

city having power to make contracts to supply water cannot constitute a monopoly, 549.

charter construed with reference to the whole, and not the individuals, 554.

cannot be created except by statute, 555.

powers of, only such as statutes confer, 555.

no particular form of words necessary to create, 556.

may result from necessary implication, 556.

enumeration of powers implies exclusion of others, 555.

may be organized under general law for every purpose within its language, 556.

even for a business which could not have been within the legislative contemplation, 556.

granting to common council power to judge of the election of its members does not oust the courts of jurisdiction, 552.

must pursue statutory modes when any are prescribed; otherwise may act in customary way, 557.

grants of special powers to, to be followed as mandatory, 630.

construction of law authorizing, to act when certificate of organization filed, 630.

must conform their action to law of their creation, 630.

all subject to the exercise of the essential powers of government, 662.

liability of stockholders cannot be altered by law subsequent to contracting debt, 663.

defective incorporation of, may be cured, 677.

COSTS —

statutes allowing, how construed, 718.

statutory provision permissive in form as to, imperative, 635.

construction of statute relative to payment of by county when convict unable to pay, 594.

COUNTIES —

title of acts relating to, 153.

of acts relating to removal of county seats, 153.

classification of for legislative purposes, 217.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

COUNTIES (continued) —

- special legislation with reference to, 217.
- subject to legislative control, 662.
- conflicting petitions for the organization of new, 719.

COUNTY PRINTING —

- in statute construed, 400.

COURTS (see **TERM OF COURT**).

- to take notice of all proper records affecting the validity of statutes, 44, 57-59.
- power of to make rules, 88.
- federal follows state, in determining whether state statute duly passed, 77.
- take notice of all facts affecting validity of statutes, 107.
- title of acts relating to courts and judicial practice, 158, 159.
 - relating to probate law and descent, 159.
- to determine what are general laws, 190, 191.
- are not to determine when general laws can be made applicable, 190.
- special legislation with respect thereto, 220.
- repeal by implication of acts relating thereto, 260.
- may declare statutes, contravening constitution, void, 296.
- take judicial notice of public statutes, 309, 327.
 - and their derivation, validity, commencement and operation, 309.
- state, take notice of federal statutes, 309.
- will inform themselves of facts which affect statutes, 309-311.
- construction of foreign law by, 320.
- function of, in the proof of foreign laws, 320.
- cannot judge of wisdom of statutes, 364.
- cannot correct excesses or omissions in, 364.
- meaning of words for, 391.
- may include both judge and jury, 400.
- will inform themselves of facts which affect statutes, 456-469.
- terms of, fixed by law, judicially noticed, 462.
- take notice who are their own officers, 463.
 - and their signatures, 463.
 - of their own records, 463.
 - not of what relates to another case, 463.
 - garnishment not another case, 463.
- have power to declare invalidity of unconstitutional laws, 497.
- will use their best energies to reconcile acts with constitution, 497.
- of two possible constructions will adopt that which will maintain statute, 498.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

COURTS (continued) —

- will not pervert language and sense of statute to maintain it when plainly unconstitutional, 498.
- judicially notice public statutes, 502.
- what included in supervisory power over inferior tribunals, 509.
- inherent power of, to make rules, 509.
- statutes not presumed to be intended to oust jurisdiction of superior, 499.
- confined to statutory power, 564.
- constitutional directions as to scope of decision directory, 620.
- statutory direction that instructions to jury be in writing, how construed, 620.
- statutory provisions as to, held directory, that the court state in writing the grounds of granting or refusing a new trial, 620.
- that the judge read over and sign record of proceedings at the end of each term, 620.
- that the judge examine a child under twelve in proceedings for adoption, 620.
- that they caution jury, directory, 620.
- to advertise adjournment of, directory, 623.
- that they number their instructions in consecutive paragraphs, 620.
- provisions granting special powers to, mandatory, 630.
- words permissive in form, or importing power and authority, imperative, 636-638.

COVENANT —

- none implied in public grants, 548-550.

CREDIBLE WITNESS —

- held to mean a competent witness, 400.

CRIMES —

- are in their nature local, 13.
- punishable exclusively in the country where committed, 13.
- title of acts relating to, 167.
- acts relating to must be general and of uniform operation, 227.
- repealing effect of new statutes changing criminal laws, 251-253.
- criminal statutes, unconstitutional in any application are void *in toto*, 299, 300.
- effect of repeal of statute relating to, 286.
- includes both felonies and misdemeanors, 400.

CRIMINAL MIND —

- necessary to conviction for offenses, 526, 527.
- in what the wrongful intention may consist, 527.
- by-laws may be violated without this element, 527.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 209-721.

CRIMINAL MIND (continued)—

- reasonable belief in existence of circumstances may rebut, 527.
- may have exculpating effect, like absence of reasoning faculty, 527.

CUMULATIVE—

- grant of jurisdiction, when not exclusive, 569, 572.
- new remedy where one already exists, 572.

CURATIVE ACTS—

- whether special legislation, 229.
- as to instruments recorded, held not repealed by subsequent statute prohibiting recording such instruments, 258.
- have a wholesome effect, 335.
- jurisdictional facts being wanting, a proceeding requiring them fatally defective, 489.
- legislature has power to pass, 675.
 - if they do not interfere with vested rights nor impair obligation of contracts, 675.
- when valid, 675.
- may validate contracts and deeds defectively executed, acknowledged or recorded, 675.
- marriage may be validated, 675.
 - and offspring legitimated, 675.
- jurisdictional facts being wanting, a proceeding requiring them fatally defective, 676.
 - and such defects cannot be cured by legislation, 676.
- validating contracts or proceedings adjudged invalid, 677.
- validating taxes and tax sales, 677.
 - defective incorporation, 677.
 - defective elections, 677.
- apply to pending proceedings, 677.

DAMAGES—

- allowed by statute for causing death, 710.
- resulting from intoxication, 695-700.
 - no apportionment of, among vendors of liquors, 700.
- in statute giving compensation, construed as in constitution, 400.

DAY—

- meaning of, 716.

DEATH—

- statutes giving right of action for, to widow and next of kin, how construed, 571, 710.
- confined generally to pecuniary damages, 710.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

DEATH (continued) —

- statute changing distribution of damages applies only to claims thereafter arising, 643.
- liberal construction of statute of limitations as applied to actions abated by death or marriage, 702.

DEBATES —

- on bill in legislature, whether may be considered in construing act, 470.

DEBT —

- against an estate, may include mortgage on land for which deceased not liable, 400.

DECLARATORY ACTS —

- nature and definition, 329, 330.
- as to meaning of existing laws, 11.

DEED OF TRUST —

- of mode of security, required on loaning public funds, not imperative, 625.

DELEGATION —

- of legislative power, 87-105.
- of taxing power, strictly construed, 541.
- of governmental authority, must be clearly made, 551.
- powers granted to city not to be delegated to committee, 552.
- may not delegate to municipality power to make or amend charter, 106.

DENTISTRY —

- practice of, held not practice of medicine, 721.

DEPARTMENTS OF GOVERNMENT —

- their functions and limitations, 2-11.

DEPOSITIONS —

- provision requiring names of parties to be endorsed on, held directory, 620.

DEPOSITOR —

- includes holder of certificate of deposit, 400.

DESCENT —

- may include property passing by will, 400.

DEVISE —

- power to take land by, not implied from that to incorporate, 557.

DIRECTLY —

- definition of, 400.

The references are to the sections: Vol. I, §§ 1-808; Vol. II, §§ 209-721.

DIRECTORY STATUTES —

- explanation of, in comparison with mandatory statutes, 610.
- no universal rule as to, 611.
- affirmative statutes do not always imply a negative, 611.
- importance of provision to be considered, 611.
 - its relation to others, 611.
- provisions as to time, 612-618.
 - which are formal and incidental, 618-626.
 - substantial observance of, sufficient, 618, 619.

DISTANCE —

- how computed on a river, 400.

DOCKET —

- of judgments, statutory directions concerning how construed, 619.

DOMESTIC ANIMALS —

- may include dogs, 400.

DRAINAGE —

- title of acts relating to, 156.

DRUNKENNESS —

- in divorce statute held not to include intoxication produced by injections of morphine, 400.

DUE —

- in statute, construed, 400.

DUPLICITY —

- effect of in subject or title of act, 144.

EIGHT HOUR LAWS —

- whether class legislation, 223.

EJUSDEM GENERIS —

- when things included in general words following particular must be, 422-434.
- such general words will not include things or persons of a superior class, 435.
- construction when enumeration is exhaustive, 436.
- intention appearing it controls these rules, 437-441.
- qualifications of, and exceptions to, the rule, 437-441.

ELECTIONS —

- title of acts relating to, 160.
- power granted to common council to judge of election of their members not exclusive, 552.
- whether statutory provisions concerning directory or mandatory, 614.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

ELECTIONS (continued) —

- statutes requiring proclamation concerning mandatory, 618.
 - that inspectors of, be sworn, directory, 622.
 - concerning manner of conducting, directory, 622.
- irregularities in, may be cured, 677.
- election laws, how construed, 709.
- construction of statutes requiring majority vote, 715.
- whether conflicting petitions for new counties and the like may be submitted at same election, 719.
- construction of statute forbidding a second election on a proposition within a time specified, 721.

ELECTIVE FRANCHISE —

- acts for extension of, liberally construed, 680.

EMERGENCY CLAUSE —

- constitutional provisions requiring, 176.
- effect of omitting, 176.
- sufficiency of emergency is for the legislature, 176.

EMINENT DOMAIN —

- grant of right to take private property without consent of owner
 - must be in plain words, 559.
 - strictly construed, 559.
- statutes for condemnation of private property not to be extended by implication, 559.
- being a common-law right, statutes regulating its exercise not to receive most rigid construction, 559.
- what interest or estate in lands to be taken, 559.
- necessity of taking a judicial question, 559.
- determination of corporate board not conclusive, 559.
- in construing acts for exercise of, two rules recognized, 559.
- exercise of, in respect to property already devoted to public use, 560.
 - power to invade prior appropriation not ordinarily implied, 560.
- construction with reference to property already appropriated to public use, 561.
- mode provided for obtaining compensation exclusive, 571.
- never implied that the government has surrendered the right of, 548.
- every material requirement of the statute to be strictly observed, 630.
- proceedings to show this on their face, 630.

EMPLOYEES —

- whether acts relating thereto, or to wages, hours of labor, etc., are special or class legislation, 223.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

ENABLING STATUTES —

to be strictly pursued, 627.

ENACTING STYLE —

importance of, under constitutions prescribing form, 68-73, 343.

ENACTMENT (see STATUTES) —

proof of, 28-59.

ENCLOSED LANDS —

meaning of, in statute, 400.

ENGLISH LANGUAGE —

intended unless otherwise specified, 721.

ENGLISH STATUTES —

to what extent operative in this country, 16-19.

ENROLLED ACT (see STATUTES).

ENUMERATION —

when general term follows, 422-441.

weakens general law as to things not expressed, 494.

EQUITABLE CONSTRUCTION —

what is, 587, 588.

now obsolete, 587, 588.

ESSENCE —

of proceeding, statutes relating to, mandatory, 630.

ESTABLISH —

defined and construed, 400.

EVIDENCE —

of existence of statute, 28-53.

acts relating to, or changing rules of, whether *ex post facto*, 654.

EXCEPTION —

what is, 351.

introduced to qualify general language, 345.

effect of void exception on validity of entire statute, 306.

intended when particular intent expressed in opposition to general intent, 345.

partial conflict between statute causes, 346.

context may have the effect to engraft an exception by implication, 345.

an exception is not co-extensive with provision it qualifies, 348.

when part of enacting clause restricts merely to matter excepted, 351.

is co-extensive with matter which precedes, 351.

not always, 351.

must be negatived in pleading, 351.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

EXCEPTION (continued) —

- exception from a statute liberally construed will be construed strictly, 352.
- exceptions to general competency of witnesses, 353.
- partial conflict between statutes causes, 372.
- context may have the effect to engraft an exception by implication, 372.
- express mention of certain, excludes others, 482.
- strengthens force of general law, 494.
- immemorial practice may control in construction of general words of statute, 603.
- where the statute of limitations makes none, the courts cannot make any, 705.
- unless in case of civil war, 705.

EXECUTION —

- statute requiring officer to file certificate of sale under, directory, 623.
- so the requirement to note on it the time of its receipt, 623.
- directing how levy under be made, directory, 623.
- requirement that sales under be made at court-house, mandatory, 629.

EXECUTIVE POWER —

- of executive department, 4, 5.

EXECUTORS —

- construction of remedial statute relating to new appointment of, on change of residence, 594.
- act remedial providing for execution of powers of will by succession of, 687.

EXEMPTIONS —

- in penal statutes construed liberally for the accused, 356.
- in favor of debtors liberally construed, 352, 596, 599, 693.
- from all taxation may be evident intention in context be only from taxation for revenue, 372.
- confined to taxes mentioned in the act, 376.
- what included in one-horse or ox-cart, 390.
- from tolls on turnpikes liberally construed in favor of agriculture, 596.
- yoke of oxen not necessarily yoke broken to work, 596.
- statutes exempting from taxes or other common burden strictly construed, 539, 540.
- of property from execution, how construed, 598.
- what change admissible as to existing debts in favor of debtors, 667.
- debtor, no vested right in, 672.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

EX POST FACTO LAWS —

- effect of changing penalty by adding milder alternative, 252, 253.
- prohibited by constitution, 335, 641.
- definition of, 649.
- application of prohibition in federal constitution, 649-650.
- prohibition of, applies only to criminal laws, 649.
- test of application, 649-651.
- requiring test oath as to past transactions, 652.
- enlarging class of witnesses, 654.
- taking away technical objections, 656.
- changing place of trial, 665.
- providing new tribunal, 655.
- new treaties for surrender of fugitives, 656.
- giving additional challenges to people, 656.
- reducing defendants' challenges, 656.
- modifying grounds of challenge for cause, 656.
- authorizing amendments of indictments, 656.
- regulating the framing of indictments to facilitate procedure, 656.
- requiring defense of insanity to be pleaded, 656.
- allowing attorney fee to be added to penalty recoverable by civil action for unlawful liquor traffic, 656.
- providing for severer penalty for repetition of offense, 657.
- change of punishment is, 658.
 - except abatement of separable part, 658.
- acts relating to procedure only, 651.
- particular acts held to be, 652.
- particular acts held not to be, 653.
- acts relating to evidence, 654.
- acts relating to jurisdiction, change of venue, etc., 655.
- acts relating to practice and procedure, 656.
- habitual criminals' acts, 657.
- changing mode of executing sentence, 659.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS —

- maxim in aid of interpretation to ascertain intention, 491.
- when mention of one or more things exclusive, 491, 492.
- not applicable when instance stated by way of example merely, 495.
 - nor when declaratory of common law, 495.
 - nor when there is reason for mentioning one and not other, 495.
- express saving, exception, etc., exclusive, 494.
- when statute enumerates persons or things to be affected, others excluded, 493.
- when statute mentions the property on which rates to be levied, they can be levied on no other, 493.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS (continued)—

enumeration of circumstances constituting personal qualification exclusive, 493.

repeal limited to clause specified, 493.

revision repeals acts not included, 493.

statutory jurisdiction confined to enumerated subjects, 493.

when right given by statute and remedy therefore prescribed, it is exclusive, 572.

when new power granted, and means of executing it, they are exclusive, 572.

when right given by statute and remedy therefor prescribed, it is exclusive, 627-633.

when new power granted, and means of executing it, they are exclusive, 627-633.

when emancipation forbidden by general law, an act permitting it in a particular form, exclusive, 627.

enabling statutes governed by this maxim, 637.

as to time, 630.

EXTRA SESSIONS—

of legislature, 65.

FATHER—

held not to include step-father, 400.

FEDERAL COURTS—

follow state courts in construction of state statutes, 314, 315.

FEDERAL STATUTES—

their scope and authority, 22.

federal and state legislation compared, 22, 23.

belong to one system, 23.

a rule for all and not to be construed with reference to conditions in one state, 721.

FEMALES—

presumed not to be meant by the term "citizen" when used to designate persons who may be admitted as attorneys, 487.

FENCE—

held not a structure, 525.

construction of statutes as to fencing tracks, 681, 721.

FERRY—

franchise to establish not construed to be exclusive, 549.

public, not included in public grant of land or water-course, 550.

private right of, passes with fee, 550.

FISH (see **GAME**).

FOOD (see **PURE FOOD LAWS**).

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

FORCIBLE ENTRY AND DETAINER —

act extending remedy by, liberally construed as remedial, 686.

FORECLOSURE BY ADVERTISEMENT —

statute regulating must be substantially followed, 563.

no intendments in favor of regularity, 563.

such sales are by contract, and therefore statute to have reasonable construction, 563.

FOREIGN LAW —

effect of depends on comity, 13.

not judicially noticed by courts, 13.

rejected when repugnant to local policy, 13.

criminatory acts done under, and consummated against law of forum, 13.

penal, etc., laws not enforced, 13.

in case of colonization, 16.

laws of one state foreign to another state, 23.

not foreign in federal courts, 23.

presumption that it is the same as the *lex fori*, 312.

how proved, 316-320.

functions of court and jury in relation to, 320.

authoritative exposition of, 314, 319.

what is, 317, 318.

proof of construction of, 320.

not judicially noticed by courts, 459.

FOREIGN NATIONS —

existence of, judicially noticed, 461.

and their forms of government, as recognized by the executive department, 461.

FORFEITURE —

statutes providing for, strictly construed, 547.

FORMAL ACTS —

statutory provisions concerning, directory, 618-626.

FORMS OF LEGISLATION 67-73.

when held to be directory, 69, 70.

when held mandatory, 71-73.

reasons for holding mandatory, 73.

FRANCHISE —

legislature may grant exclusive, 284.

but will be strictly construed, 284.

cumulative franchises not exclusive may be granted, 284.

grants of, by public, strictly construed, 549.

no implication of an exclusive grant, 549.

The references are to the sections: Vol. I, §§ 1-308: Vol. II, §§ 309-731.

FRANCHISE (continued) —

- public, can only be created by an act of the legislature, 549.
- public grants of, not implied to be exclusive, 549.
- the grant of right to take and exact toll not implied, 549.
- power to incorporate does not include power to take lands by devise, 549.

FREEHOLDER —

- held to include a married woman, 400.

FROM —

- defined and construed, 400.

FRAUD —

- liberal construction of acts to prevent, 683.
- statutory regulations to prevent, in assignments for benefit of creditors, amendatory, 633.

FRAUDS, STATUTE OF —

- liberal construction to carry out its purpose, 600.

FUNDAMENTAL POWERS —

- necessity of their separation, 2.
- how separated and how corrected, 2, 3.
- the province of each, 2, 3.
- not defined in the constitution, 7.

FUNDAMENTAL RIGHTS —

- statutes not construed to interfere with, 453.

GAME —

- title of acts relating to fish and game, 166.
- construction of laws relating to, 713.

GAMING —

- what is, 523.
- contract for purchase of options is not, 523.
- title of acts relating to, 165.
- game held to include horse race and base ball, 400.
- statutes intended for protection against, not applicable to professional gamblers, 604.

GARNISHMENT —

- law of, inapplicable to municipal corporations, 601.
- not another case, 463.
- construction of statutes providing for, 694.

GENERAL AND SPECIAL LAWS (see CLASSIFICATION; LAWS OF A GENERAL NATURE; SPECIAL LAWS; STATUTES) —

- what are general laws, 189, 194-196.
- what are special and local laws, 199.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

GENERAL AND SPECIAL LAWS (continued) —

- when a general law exists on a subject, it is judicially apparent that such a law can be made applicable, 191.
- enumerated subjects must be dealt with by general laws, 191.
- courts must determine what are general laws, 190, 191.
- laws are general when they deal with a whole generic class, 195.
- classification of subjects for general legislation, 195, 196.
- laws of a general nature, 194-198.
- uniform operation of laws of general nature, 194-198.
- general rules for determining whether act general or special, 200.
- not a question of form, 200.
- acts whose operation is dependent upon local adoption, 201.
- effect of limit of time for adoption, 201.
- whether act general or special is a question of classification, 202.
- 203.
- general principles of classification for legislative purposes, 203.
- classification of municipalities according to population and whether acts relating to such classes are special or general, 204-212.
- for what purposes such classification is permissible, 211.
- whether municipalities under special charters may constitute a class for general legislation, 212.
- acts relating to a class of municipalities not based on population.
- 213.
- acts relating to a class based upon existing or past conditions, 214.
- acts relating to a class of one or a few, 215.
- acts rendered special by an evasive classification, 216.
- the question of general or special legislation considered with reference to various acts as follows:
 - acts relating to municipal corporations, 204-216.
 - acts relating to counties and county affairs, 217.
 - acts relating to schools, school districts and school affairs, 218.
 - acts relating to railroads, 219.
 - acts relating to courts and judicial procedure, 220.
 - acts relating to insurance and insurance companies, 221.
 - acts relating to building and loan associations, 222.
 - acts relating to wages, labor employees, etc., 223.
 - acts relating to mines, 224.
 - Sunday laws, 225.
 - acts providing for attorneys fees in particular cases, 226.
 - criminal laws, 227.
 - miscellaneous acts, 228.
 - amendatory and curative acts, 229.
- a general law cannot be amended so as to destroy uniform operation, 229.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

GENERAL PRINCIPLES —

doubtful provisions not construed so as to conflict with, 447.

GENERAL USAGE —

effect of, in construction of statute, 473.

must be universal, 473.

practice inconsistent with statute cannot repeal it, 473.

of no avail against plain statute, 473.

practical construction by those for whom a law is enacted, 474.

not allowed to defeat manifest purpose, 474.

GEOGRAPHY —

courts take notice of, of state, 463, 464, 467.

of notorious surveys, etc., 462.

of civil divisions created by law, 462.

GIFT —

held not to include gift *causa mortis*, 400.

GOODS AND CHATTELS —

held to include choses in action, 400.

GOODS, WARES AND MERCHANDISE —

held to include mules and horses, 400.

GRANT OF POWER —

strictly construed when by its exercise one may be divested of his property, 627.

the prescribed procedure mandatory, 627.

GRAIN —

held to include broom-corn and flax, 400.

GRAMMATICAL SENSE —

presumed to be intended unless evidence of different intention, 408.

only a rule of interpretation and gives way when a different intent appears, 408.

common-sense construction may require departure from, 409.

application of relative words, 409.

effect of general qualifying words at end of sentence or in middle, 409.

tense of statutes not always followed, 409.

relative words refer to last antecedent, 405, 409, 420, 421.

GRANDCHILD —

when included under term child, 400.

GREATER PART —

in partition statute, held to refer to quantity, not value, 400.

HABITUAL CRIMINALS' STATUTES —

whether *ex post facto*, 657.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

HARDSHIP —

considered in construction of ambiguous statute, 490.
otherwise if intention plain, 490.

HEADINGS —

effect of, in construction, 362.

HEIR —

defined and construed, 400.
denotes one capable of inheriting, 398, 400.
inherits according to common-law where statute silent, 608.

HIGHEST OFFICE —

meaning of, in statute, 400.

HIGHWAY —

held to include streets and alleys, 400.

HISTORY —

courts take judicial notice of, as to facts of general interest, 462.
courts take more particular notice of the, of the state where they sit, 462.

HOUSE —

construction of, in burglary statute, 400.

HOUSEHOLDER —

held not to include a bachelor living alone in a house, 400.

HOUSE OF LORDS —

branch of legislature and a judicial tribunal, 3.
relation of judges thereto, 3.

HOUSE OF PROSTITUTION —

held to include a house prepared for that purpose though not yet so used, 400.

HUSBAND AND WIFE (see MARRIED WOMEN).

acts relating to rights of, construed as prospective, 644.
construction of acts relating to, 712.

IMMEDIATELY —

meaning of in statute, 400.

IMPLICATIONS —

resorted to to sustain but not to destroy statute, 83.

IMPLICATIONS AND INCIDENTS —

what is a necessary implication, 503.
what is implied from a statute is a part of it, 500, 501.
statutory felony includes common-law elements and incidents, 500.
procurers and abettors are principals and accessories on the same terms, 500.
in such cases, same peremptory challenges allowed, 500.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

IMPLICATIONS AND INCIDENTS (continued) —

it is incident to all public laws that they be noticed judicially by courts, 502.

otherwise as to private statutes, 502.

if penalty imposed for doing an act, it is impliedly prohibited, 502.
implied that a contract about things unlawful is void, 503.

all cases to which a statute cannot constitutionally apply impliedly excepted, 503.

when statutory provision general, everything necessary to make it effectual implied, 504.

public grant to individuals to be enjoyed in a corporate capacity creates corporation, 504.

of rights, may be asserted by statutory designation, 504.

statute enlarging rights of married women impliedly abolished estates by curtesy, 505.

disability under statute of limitations, 505.

right to trade implied from right to own and enjoy merchandise, 505.

where new statute extends existing new power, it is extended with its limitations, 254.

that established policy not intended to be departed from, 254.

married women may incur liability for repairs to separate property, 505.

private examination of married women unnecessary when they acknowledge deed of separate property, 505.

power to trade includes that to borrow money 505.

that married woman borrows on her separate estate, 505.

that a default judgment is by consent and not appealable, 506.

when duty to repair implied from condition to build, 506.

of disability of minors to sue for partition from provision that plaintiff must state titles of parties, 506.

from existence of a right that there is appropriate remedy by statute or common law, 507.

grant of power implies a grant of all necessary or incidental power, 508, 511, 512.

when measure directed ordinary means implied, 508.

power to examine witnesses: authority to subpoena them implied, 508.

power to grant alimony, incident to divorce jurisdiction, 508.

extending expressly penal regulations to new subjects, implies that they were not before included, 491.

implied exclusion of things not mentioned, 491.

enactment of law does not imply it was not the law before, 495.

power to sheriff to sell personal property implies power to take possession, 510.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

IMPLICATIONS AND INCIDENTS (continued) —

power to create a municipal debt implies power to levy taxes to pay it, 510.

IMPRISONMENT FOR DEBT —

not part of contract, and may be abolished without impairing its obligation, 667.

IMPROVEMENTS —

remedial act for set-off of, 638.

INDICTMENT —

subsequent statute regulating framing or amendments of, not *ex post facto*, 656.

IN FORMA PAUPERIS —

right so to sue construed strictly, 571.

INJURY TO PERSON —

held to include libel, 400.

INJUSTICE —

argument based on, forcible, 267, 498, 490.

INSOLVENT DEBTORS —

statutes for discharge of, strictly construed, 547.

IN SUBSTANCE —

meaning of statute, 400.

INSURANCE —

special and class legislation in respect to insurance and insurance companies, 231.

INSURANCE POLICY —

legislature may not delegate power to prescribe form of, 91.

INTENTION —

literal meaning may be departed from to avoid absurdity and carry out, 489.

of statute, when ascertained, controls in construction of its parts, 347.

general words restricted to it and narrower words expanded to it, 347, 348.

may be cut down to avoid conflict with settled policy, 347.

when ascertained, 347, 348.

words may be altered or supplied to harmonize parts with it, 347.
construction which accords best with subject and general purpose will prevail, 348.

when a general intent and a particular intent are expressed the latter will prevail, 268, 275, 287, 345, 351, 360, 387.

where general act required and repeals inconsistent provisions it repeals special acts on same subjects, 276.

The references are to the sections: Vol. I, §§ 1-303; Vol. II, §§ 309-721.

INTENTION (continued) —

intent of a statute is the law, 363.

must be embodied and expressed in the statute, 363.

a statute is hence a written law, 363.

it is there to be first sought for without other-aids, 365, 366.

all rules of interpretation are intended to reach it, 363.

where it is plain and obvious no interpretation necessary, 363.

rules of construction are only important as they serve to ascertain the intention, 363, 364.

and this is true as to all statutes, 363.

if plainly expressed in the statutes it cannot be controlled by anything extraneous, 366.

whole statute to be read to determine it, 363.

if plainly expressed it is to be followed without further inquiry, 367.

then the simple duty of the courts to enforce the law according to its terms, 366, 367.

cases cannot be included or excluded merely because there is no reason against it, 366.

if different from the literal import, it should prevail, 366, 374.

question for the court is, what did the legislature really intend, 367.

if it is plain from the statute itself, and others, *in pari materia*, no different intent can be imputed to serve a supposed policy or maintain its validity, 367.

one part to be construed with another, 363.

the general intent the key to that of all the parts.

it is controlling as to minor parts, 370, 374.

declaration of, in an act controlling, 376.

ascertained from whole act, a guide in reading particular words and expressions, 370-376.

may exclude cases within the letter, 372.

in following the, where reason ceases, the law ceases, 372.

notice not necessary to officer of his own act, 372.

possession of game during period prohibited when consistent with innocence, 372.

requirement of notice of things done, may require notice of non-action, 372.

general exemption from taxation may be confined to taxation for revenue, 372.

new condition may be supplied by implication, 373.

or new exceptions, 376.

inaccuracies of name may be corrected, 373.

literal sense of words departed from, 374-376, 396, 403.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 339-721.

INTENTION (continued) —

- “city” may include incorporated town, 374.
- limited words or expressions may be expanded, 374.
 - or general words restricted, 376.
- seemingly incongruous provisions brought to harmonize, 374.
- restrictive clauses in one section may be amended by implication in others, 376.
- context will not modify natural effect of words contrary to, 376.
- words and phrases to be construed according to, 389.
- things within intent, within statute though not within letter, 379.
- things not within intent, not within statute, though within letter, 379.
- to carry out intent words enlarged or restricted, 381.
 - or deemed inserted, 382.
 - or one substituted for another, 383.
 - or disregarded or eliminated, 384.
- there can be no intent not expressed in words of statute, 388.
- implied exceptions to general language, 385.
- “immediate danger” qualified to effectuate, 396.
- “and” and “or” used indifferently and construed according to, 397.
- presumption of, where legislature enact a statute without change after it has received construction, 399.
 - when re-enacted with change, 399, 401.
- will control grammatical sense, 408.
- may be effectuated by correction of mistakes by context, 410-413.
 - omitted words may be supplied, wrong word changed to correct one, and meaningless disregarded, 410-413.
 - by transposing clauses, 410-413.
- must be clear to correct words of statute, 410-413.
- controls the rule from associated words and maxim of *ejusdem generis*, 420, 421, 422, 437-441.
- proof of extrinsic facts supposed to have been known to legislators and to have influenced their intentions, 462.
- strict construction not to defeat, 519-521, 528-530.
- case must be within, and also letter of penal statute, 520, 521.
- to bring case within penal statute there should be a criminal intention, 526-528.
- liberally inferred in construing remedial statutes, 583.
- cases not within, excluded, 585.
- how to be learned, 586.
- no set form to express, 590.
- words controlled by, when manifest, 590-592, 599.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

INTENTION (continued) —

- how it controls in construction of statute of limitations, 702-708.
- of statute of frauds, 600.
- cases not within, excluded though within the letter of the statute 601.
- municipal corporations excluded from general law of garnishment, 601.
- words may be restrained to bring operation of statute within, 601, 602, 687.
- whether statute directory or mandatory decided upon, 611.
- where doubtful, statute construed to operate prospectively, 642-646.

INTERNAL IMPROVEMENTS —

- held not to include public buildings, 400.

INTERPRETATION (see CONSTRUCTION) —

- compared with construction, 365.

INTERPRETATION CLAUSE —

- introduced to remove possible obscurity, 345.
- binding, authoritative, 358, 360, 374.
- criticisms of, 359.
- general and special provisions of the nature of, 360.
- latter of most weight, 360.
- enactment based on misconception of what the law is, does not of itself change the law, 360.
- general statutory definition will apply only where no different intention appears, 497.
- when authoritative, 576.
- not binding on the courts, 576.
- when legislative construction high evidence of intention, 576.
- to what applicable, 576.
- when strictly construed, 576.
- regarded with disfavor in England, 577.
- not always regarded as containing definitions, 578.
- but provisions by way of extension, 578.
- will still include its proper sense, 578.
- not generally absolute, but only applicable when not inconsistent with intent, 575.
- when penal acts declared remedial, 684.

INTOXICATING LIQUORS —

- nature of judicially noticed, 466.
- title of acts relating to, 163.
- repeal by implication of acts relating thereto, 259.
- civil damage acts, 695-700.
- statutes forbidding sale of liquor to minors, 701.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

INTOXICATION —

- statute allowing recovery of damages for, against vendors of liquors and of renters, 965.
- held remedial, 695-700.
- actual damage necessary, 696.
 - injury to person must be physical, 696.
 - exemplary allowed only where there are aggravations, 696.
 - exception in Ohio, 696.
- consequential injuries recoverable, 696.
- construction as to elements of damage, 696, 699.
- form of remedy and parties, 699, 700.

IN TRANSIT —

- in tax law, construed, 400.

IRRIGATION —

- title of acts relating to, 156.

JAIL —

- held to include city calaboose, 400.

JOINT RESOLUTION —

- judicial notice of, 323.

JOURNALS (see LEGISLATIVE JOURNALS).

JUDGMENT —

- legislature cannot set aside or modify, 11.
- in interest statute, held to include condemnation judgment, 400.
- whether a contract within constitution as to impairing obligation of contracts, 669.
- rendered without jurisdiction, cannot be validated, 676.
- statute providing for obtaining, on motion strictly construed, 566, 571.
- construction of remedial statute as to effect of voluntary discharge from arrest under, 591.
- act to prevent delays in obtaining, remedial, 686.
 - providing for docketing, how construed, 619.

JUDICIAL NOTICE —

- of state statutes by federal courts, 23, 313.
- of legislative journals, 57-59.
- of call for extra session of legislature, 65.
- of result of election to adopt or approve act, 80.
- of statutes, 57, 309, 327.
- of facts that affect the validity, operation or construction of statutes, 107, 310, 456-469.
- of facts relating to the passage or existence of statutes, 311.
- of English statutes, 312.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

JUDICIAL NOTICE (continued) —

- of the common law, 312.
- of private statutes, 321, 322.
- of rules and regulations made by government department, 323.
- of joint resolution, 323.
- of proclamation of amnesty, 323.
- of public law, 457, 458.
 - commencement, expiration and repeal of statutes and their construction, 457.
 - of any decision that they are unconstitutional, 457.
 - includes notice of all facts and proceedings which concern their validity and interpretation, 457.
 - may resort to history to do away with obscurity, 458.
- of the common law and the fundamental law, 459.
- the law of nations, 459.
- the law merchant, 453.
- of the antecedent laws, 459.
- of matters so notorious as to be universally known, 457.
- matters within the cognizance of the particular court, 457.
- when acts done in pursuance of foreign law made effectual by domestic, the former noticed, 457.
- of territorial divisions of state, 459.
- of corporations and institutions established by law, 459.
- of state laws by federal courts, 457.
- treaties, law of the land and judicially noticed, 457.
- of general customs, 459.
- of meaning of C. O. D., 459.
- business of mercantile agencies, 460.
- commercial usages as to holidays, 460.
- customs of the road, 460.
 - of the sea, 460.
- private statutes and by-laws not noticed, 460.
 - nor municipal ordinances, 460.
- of existence of foreign nations, 461.
 - their national emblems and flags and seals, 461.
 - that they have judicial tribunals, etc., 461.
 - and general nature of their jurisprudence, 461.
- supreme court maintained its appellate jurisdiction depending on amount by taking notice of vast mining operations on the public lands, 462.
- courts take notice of the result of an official census, 462.
 - of derivation of land titles, 462.
 - that a portion of state was in insurrection, 462.
 - and under whose control, 462.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

JUDICIAL NOTICE (continued) —

- that in consequence certain courts closed, 462.
 - civil law suspended, 462.
 - what law prevailed, 462.
- that the Confederate currency imposed by force, and at discount, 462.
 - of the general facts relating to its emission, etc., 469.
- the accession of persons to office and the tenure under constitution and laws, 462.
- the geography and topography of state, 462, 467, 468.
- the navigability of large rivers, 466.
- the history of state as to facts of general interest, 462.
- of the boundaries of state, 462.
 - its civil divisions created by law, 462.
- of notorious surveys, streets, areas and lines, 462.
- of terms of courts fixed by law, 462.
- of their own officers, and records, 463.
 - not of contents of record in another case, 463.
 - garnishment not another case, 463.
- of facts in general, 464-469.
- of the character of a trade as to being a nuisance, 464.
 - of gift enterprises, 466.
- of the seasons, 465.
 - calendar, 465.
- that a patent was void for want of novelty, 467.
- of the course of nature, 465, 468.
- mortuary tables based on, 465.
- of the nature of liquors, 466.
- that coal oil inflammable, 468.
- of the course of agriculture, 465.
 - when particular crops mature, 465.
- not of vicissitudes of climate, 465.
- of what is generally known in their jurisdiction, 467.
- of the art of photography, 468.
- of philosophic and scientific facts and principles, 468.
- of the nature of lotteries, of billiard tables, 469.
- of the character of the circulating medium and meaning of popular language concerning it, 469.
- of the changes in the course of business and of new processes to facilitate it, 469.
- of railroad superintendent's general authority, 469.
- of the customary price of ordinary labor, 469.
- of meaning of well-known abbreviations, 469.
- that free masonry a charitable institution, 469.
- the usual duration of voyage across the Atlantic, 469.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

JUDICIAL NOTICE (continued) —

- the ordinary incidents of railway travel, 469.
- that the language of all countries fluctuates, 469.
- the distance between well-known cities, 469.
- the speed of railway travel between them, 469.
- particular facts of state history, 463.
- that the business of a barber is not a work of necessity on Sunday, 469.

JUDICIAL POWER —

- what is, 2-6.
- what its exercise includes, 6.
- authority in exposition of law, 6.
- nature of, 7.
- determines what the law is, 12.
- and kind and measure of redress, 12.
- whether appointment to office is exercise of, 4.

JUDICIARY —

- its function to expound the laws, 2.
- what measure of judicial power vested in, 6.
- within province of, to decide as to validity of statutes, 44.

JURISDICTION —

- may be taken away by repeal of statutes conferring, 285.
- effect of, 285.
- effect of abolishing and restoring, on pending cases, 285.
- statutory, confined to enumerated cases, 509.
- when general, 509.
- divorce, includes power to grant alimony, 508.
- incidental powers from, general and special, 509, 510.
- statutes assuming by regulating exercise of, confer, 509.
- granted to a court, to be exercised as such, 509.
- statutes not presumed to intend to oust, of superior courts, 499.
- a statute giving common council power to judge of the election of its members does not oust the jurisdiction of the courts, 552.
- special, must be confined to enumerated subjects, 551.
- and exercised according to statute, 567-569.
- over waters, with reference to low-tide line, 558.
- towns may have co-extensive, 558.
- statutory, conferred on courts, how construed, 564.
- methods of obtaining, strictly construed, 567.
- of courts, not given or lost by implication, 568.
- not taken away by grant of similar to another tribunal, 568-570.
- granted by constitution, cannot be abridged or altered by legislation, 397.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

JURISDICTION (continued) —

- granted by constitution, unalterable by legislature, 570.
- repeal of statute giving jurisdiction takes away power to proceed in pending cases, 646.
- judgment rendered without, cannot be validated, 676.
- statutory, act conferring construed strictly as to extent, liberally as to mode of exercise, 686.
- of justices, as to penalty, 689.
- depending on junction of towns, 688.

JURY —

- held to mean a witness in a procedure act, 599.
- statutory provisions as to summoning, directory, 615.
- as to drawing, directory, 620, 623.

LABOR —

- construction of statutes giving lien for, 690-692.

LAND GRANTS —

- for public enterprises, how construed, 550.
- do not include right of public ferry, 550.
- to ascertain intent of, courts may consider condition of country and the purpose declared on face of, 550.

LANDLORD AND TENANT —

- statute amending another affording summary remedy between, liberally construed, 686.

LAW MERCHANT —

- courts take notice of, 459.

LAW OF NATIONS —

- courts take notice of, 459.

LAW OF THE CASE —

- a decision of the supreme court is **the**, in subsequent proceedings, 486.

LAWS —

- in case of change of sovereignty, 20.
- of colonists, 16, 17.

LAWS IMPAIRING OBLIGATION OF CONTRACTS —

- recording laws affecting priority may be passed, 663.
- contracts may be validated by subsequent statute, 663.
- corporate charter not subject to be forfeited by statute for past acts, which when done not cause, 663.
- state contracts within constitutional prohibition, 664.
- what impairment of prohibition prevents, 664.
- municipal power of taxation cannot be withdrawn to impair its capacity to pay debts, 664.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

LAWS IMPAIRING OBLIGATION OF CONTRACTS (continued) —

remedy within control of state, but cannot be so changed as to materially affect obligation of contracts, 665-668.

how greatly may remedy be changed, 667.

list of admissible changes, 665.

prohibited by constitution, 335.

laws affecting validity, construction, discharge or efficient enforcement, 660, 663,

prohibition applies to executed and executory contracts, 661.

to corporate charters, 661, 662.

state cannot impair obligation of its contracts, 661, 662.

statutes granting franchises, bounties, patents, copyrights, etc., protected against impairment, 662.

prohibition does not permit any degree of impairment, 663.

does not permit any change of the terms, 663.

extends to change of law by judicial decision, 663.

bankrupt or insolvent law for discharge of debtor prohibited, 663.

or discharge by part payment, 663.

laws of this effect prohibited, 641.

what laws come within prohibition, 660-671.

effect of mortgage cannot be changed, 666.

mode of redemption may not be altered, 666.

nor conditions of sale, 666.

how far exemptions allowed, 666, 667.

legislation not permitted to effect construction of existing contracts, 667.

and parties entitled to a remedy as efficacious as when the contract was made, 667.

stay laws, 667.

change of jurisdiction of courts to adjudge present payment or collection of debts, 667.

imprisonment for debt may be abolished, 667.

preventing mortgagee from taking possession before foreclosure, 667.

shortening the time of redemption, 667.

suspending the right to sue on the bond or note until after foreclosure, 667.

whether judgment a contract, within constitution, 669.

LAWS OF A GENERAL NATURE (see **GENERAL AND SPECIAL LAWS**) —

what are, 197.

required to have a uniform operation, 189, 198.

what is meant by uniform operation, 198.

there may be differences in details, 195.

requirement intended to prevent privileges or immunities to one class and not others, 195.

criminal laws must have a uniform operation, 227.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

LEGISLATIVE INTERPRETATION —

when conclusive, 472.

long, should be adhered to, 476.

LEGISLATIVE JOURNALS —

as evidence of the due enactment of statutes, 30-53;

unreliability of, 46.

cannot be aided or contradicted by parol evidence, 47.

nor by other documents or records, 47.

not records at common law, 48.

their force as evidence to affect validity of statutes, 31-53.

records, when required by the constitution, 48.

may be consulted for parliamentary history of an act, 47.

silence of journals as to facts not required by the constitution to be entered will not affect statute, 41, 51, 52.

entries necessary to show compliance with constitution in particulars required by it to be there shown, 53.

when there is power to dispense with readings on separate days the cause need not be entered on, 55.

when enrolled, act impeached by, 52.

matters which constitution expressly requires to be entered in, 53.

judicial notice of, 57-59.

LEGISLATIVE POWER —

what is, 2-11.

distinct from other fundamental powers, 2.

of federal government, vested in congress, 5.

of congress, 5.

of state legislatures, 5, 7.

its sole function of law making, 7.

nature of, 7, 8.

how it acts, 8.

scope of its exercise, 8, 9, 12.

limitations, 11, 12.

federal and state, 5, 22.

of states, is plenary, 81.

cannot be delegated, 87.

exceptions, 95.

powers may be granted which are *quasi*-legislative, 88.

what a delegation of, 87-105.

power to make rules and regulations, 89.

power to suspend and put in force a statute at pleasure, 90.

power to prescribe form of insurance policy, 91.

acts for incorporation of municipalities, 92.

acts held to be, 93.

acts held not to be, 94.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

LEGISLATIVE PROCEDURE —

- constitutional regulations of, mandatory, 27, 31, 44, 45, 55, 71, 72, 73.
- bills must be signed by presiding officer, 56.
 - only necessary when expressly required, 56.
 - signatures of presiding officers not a part of legislative process, 56.
 - purpose of requiring them, 56.
- when acts should be approved, 60-62.
 - nature of functions of executive on bills, 60.
 - how a bill will become a law without approval, 62, 63.
 - computation of time for this purpose, 62-64, 184, 188.
- how a bill to be returned when vetoed, 64.
- submitting to popular vote laws or questions relating thereto, 90-106.
 - local laws may be made to depend on popular vote, 102.
- speaker *pro tem.* may sign bills, 56.
- constitutional limitation of time for introduction of bills, 66.
- forms of legislation, 68.
- bill, act, ordinance, resolution, 68.
- enacting style, 69-73.
- effect of statutory requirements, and legislative sales as to, 76.
- adoption of code or revision by reference, 75.
- miscellaneous cases as to procedure in enacting statutes, 80.

LEGISLATIVE RECORDS —

- at common law, 28-30.
 - whether conclusive, 29, 31.
- when legislative journals may be consulted to impeach, 44-53.

LEGISLATURE —

- has exclusive power to make laws, 2.
- scope of its functions, 8, 11.
- action of not subject to judicial control, 4.
- cannot exercise judicial power, 11.
- acts of *de facto*, binding, 27.
- legal organization of, 27.
- is in America a representative body, 30.
- derives its power from a constitution, 30.
- compared with British parliament, 24.
- must legally convene, 27.
- it exercises a delegated power, 27, 30.
- must keep within power granted as to membership, 27.
- procedure prescribed in constitution mandatory, 27, 30, 31, 44, 45, 55.
- common-law record of legislation, 28.
- legislative records under constitutions, 31.

The references are to the sections: Vol. I, §§ 1-808; Vol. II, §§ 809-721.

LEGISLATURE (continued) —

extra sessions of, 65.

whether sufficient cause for convening not for courts, 65.

what legislation permissible at, 65.

one legislature cannot bind another by rules or statutes as to procedure, 76.

where power to legislate is conditioned on existence of certain facts, 79.

majority constitutes quorum, 80.

has plenary power of legislation and may pass any law not forbidden by constitution, 81.

motives of, not subject to judicial inquiry, 84.

may not delegate to municipality power to make or amend charter, 105.

cannot authoritatively declare what the law is or has been, 358.

a legislative construction of a statute has weight, 358.

its authority is exclusively to declare what it shall be in the future, 358.

presumed to know existing statutes, 355, 447.

LEVEES —

title of acts relating to, 156.

LEVY —

statutory provision as to making, before witnesses not imperative, 623.

LIABILITY —

statutes creating or increasing, strictly construed, 547.

LIBERAL CONSTRUCTION —

to what statutes applied, 582, 583.

applied to remedial and other statutes enacted *pro bono publico*, unless prevented by some paramount rule of construction, 584, 586.

applied to carry out intention, 583.

intention liberally inferred by, 583.

what is, and illustrations, 589-604.

consists in giving words such meaning as renders statute effectual to carry out intention, 590.

of redemption laws, 596.

exemptions, 598, 693.

of word "jury" in procedure act, 599.

of statute of mortmain, 599.

of testamentary bond, 599.

of statute of limitations, 702-708.

when action abated by death or marriage, 702.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

LIBERAL CONSTRUCTION (continued) —

- of the statute of frauds to effectuate its purpose, 600.
- by, cases excluded though within the letter, if not within the intention, 601, 602.
- of act to prevent delay in obtaining judgment, 636.
- purpose of, 605.
- of statutes relative to arbitrations, 685.
- of statutes giving right of appeal, 717.
- of acts extending elective franchise, 680.
 - taking away penalties, 680.
 - providing compensation, 680.
- provision in favor of tax-payers, etc., 680.
 - for protection of officers, 681.
 - married women, 681.
- of acts for accomplishment of public objects, 682.
 - for prevention of fraud, 682.

LICENSE —

- pursuing profession without required license vitiates claim for services, 502.

LIEN (see **MECHANICS' LIEN**) —

- laws providing for, how construed, 692.

LIFE INSURANCE COMPANIES —

- held to include mutual benefit societies, 400.

LIMITATIONS —

- repeal by implication of acts relating thereto, 265.
- under successive, part of time under one may be added to period under another, 265.
- as to new trials and appeals, 545.
- defense of statute of, a vested right, 671.
- time occurring before passage of statute may be added to time afterward to make up period, 674.
- effect of title sustained by the bar where parties reside, 668.
- statute of, relates to remedy and not directly to right, 668.
 - does not necessarily impair obligation of contract, 668.
- statute of, at place of suit applies, 668.
- of action against sheriffs, etc., in remedial statute, how construed, 591.
- statutes of, how construed, 544, 545, 702-703.
 - where action has abated by death or marriage, 702.
- when statute has made no exception, the courts can make none, 705.
 - one recognized in case of civil war, 705.
- acts changing the period of, 706, 707.
- whether rights once barred may be revived, 708.

The references are to the sections: Vol. I, §§ 1-368; Vol. II, §§ 309-721.

LOAN —

may be construed in remedial statute to mean moneys voluntarily advanced without legal request, 596.

LOCAL LAWS (see **GENERAL AND SPECIAL LAWS; SPECIAL LAWS**) —

may be made to depend on popular vote, 102.

may be made to depend on adoption by local authorities, 102-106.

LOCAL OPTION —

local option laws not special legislation, 228.

LOGS —

construction of statutes giving lien upon, 692.

LOT —

held to mean tract or parcel, 400.

MAJORITY —

construction of statutes requiring majority vote, 715.

MAN —

may include a minor, 400.

MANDATORY STATUTES —

what they are, 627.

where a particular mode of doing an act authorized by statute is pointed out it must be pursued, 627.

enabling statutes are, 627.

prescribed procedure for exercise of newly granted power mandatory, 627.

laws protecting tax-payers are such, 627, 628.

provision requiring certain words to be inserted in venires, 629.

sales under execution to be made at court-house, 627.

statutory requirement can never be dispensed with as directory

where departure from can work injury, 629.

acts such, when of the essence, 629.

when mandatory as to time, 630.

statutory proceedings governed by rule of, 630.

letting work by competitive bidding under municipal charter, 631.

statutes for exercise of power of eminent domain, 631.

prescribing mode of adopting resolutions for certain purposes by common council, 631.

regulations as to new right, privilege or immunity, 632.

relating to sealed bids, 632.

regulating municipal proceedings to contract debts, 633.

statute of frauds, 633.

where intention would otherwise be defeated, statutes are mandatory, 633.

relating to building material for protection against fire, 633.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

MANDATORY STATUTES (continued) —

for certain mode of making assignments for benefit of creditors to prevent fraud, 633.

when permissive in form, 635-640.

MANUFACTURER —

held not to include a merchant tailor, 400.

MARGINAL NOTES —

effect of, in construction, 362.

MARRIED WOMEN —

enlargement of their rights implies abolition of estate by curtesy, 505.

removes disability under statute of limitations, 505.

right of to own and enjoy merchandise implies right to trade, 505.

to convey land without private examination, 505.

their power to trade implies power to borrow money, 505.

that she borrows on her separate estate, 505.

when statute specifies cases in which they may sue, others excluded, 493.

repeal by implication of acts relating thereto, 264.

acts giving them control of separate property do not abolish title by entreties, 264.

statutes increasing powers of, strictly construed, 574, 711.

have been held remedial and to be liberally construed to effect intent, 574, 711.

a statute authorizing them to have, hold and possess property will not authorize them to make sales and purchases, 607.

acts for protection of, liberally construed, 681.

statutes prescribing mode of exercising or enforcing new rights mandatory, 632.

acts relating to rights of, construed as prospective, 644.

MARRIAGE —

under prohibited conditions may not constitute bigamy where there is no criminal purpose, 527.

statutes abolishing any of the incidents of, strictly construed, 574.

how statute of limitations construed as applied to suits abated by, 702.

MAY —

when mandatory, 634-640.

when "may" and "shall" used in same provision, 640.

MECHANICS' LIEN (see LIEN).

construction of statutes providing for, 690, 691.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

MEMBERSHIP OF LEGISLATURE —

constitutional limit imperative, 27.

MERCANTILE AGENT —

defined and construed, 400.

MERCHANT —

held to include ice dealers, 400.

MERCHANT TAILOR —

held not a manufacturer, 400.

MERITS OF LEGAL CONTROVERSY —

what law governs, 12.

plaintiff to have title at commencement of action, 253.

MESNE PROFITS —

act for set-off of value of improvements against, 688.

MINES —

acts relating to, whether special or class legislation, 224.

MINOR —

construction of statutes forbidding sale of liquor to, 701.

MISCHIEF —

intended to be cured considered in construction, 456, 471.

liberal construction of remedial statutes to suppress, 583, 584, 605.

MISTAKES —

may be corrected by construction, 410-413.

in title and whether same may be corrected by act or otherwise,
133, 138.

in repealing clauses, construction and effect, 293.

MONTESQUIEU, BARON —

his view of the union of the fundamental powers, 2.

MONTH —

not a technical word, and understood generally as a calendar, 716.

MORTGAGE —

subsequent legislation restrained affecting sale, redemption, etc.
by prohibition of laws impairing obligation of contracts, 666.
also to prevent mortgagee from taking possession until after
foreclosure, 667.

subsequent statute suspending the right to sue on the note or bond
until after foreclosure impairs the obligation, 667.

so a statute shortening the time of redemption, 667.

a trust deed is a, 400.

MOTIVES —

no issue allowable as to legislature, 496.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

MUNICIPAL BONDS —

how protected by constitutional prohibition of laws impairing obligation of contracts, 663, 664.

MUNICIPAL CORPORATIONS —

may not bind themselves by acceptance of foreign statutes, 13.

whether laws for incorporation of, a delegation of legislative power, 92.

title of acts creating, or to revise, consolidate or amend their charters, 148-152.

of acts relating to light, water, railroads, etc., in, 149.

of acts relating to streets, improvements, buildings, lands, etc., in, 150.

of acts relating to the annexation or exclusion of territory, to or from, 151.

classification of according to population for legislative purposes, 204-211.

for what purposes such classification is permissible, 211.

validity of laws relating to municipalities under special charters as a class, 212.

classification of, generally for legislative purposes, 213.

repeal by implication of acts relating thereto, 262.

construction of acts creating, or granting power thereto, 551.

construction of particular powers granted thereto, 582, 583.

provision of charter that work be let to lowest bidder imperative, 631.

provisions mandatory requiring particular proceedings to contract debt, 633.

not within law of garnishment, 601.

under legislative control, 662.

their charters not contracts, 662.

taxing power of, cannot be withdrawn so as to impair the means of paying their debts, 664.

contract which is *ultra vires* may be made good by curative act, 675.

defective organization of, may be cured, 677.

MUNICIPALITY —

held to include county, 400.

MUNICIPAL PRACTICE —

under indefinite provisions of charter respected, 477.

MUTUAL BENEFIT SOCIETIES —

held to be life insurance companies, 400.

NEGATIVE STATUTE —

what is, 331, 332.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 379-731.

NEGATIVE WORDS—

- make a statute mandatory, 611, 627.
- provisions granting new power prescribing mode of exercise, imply them, 627.
- statutes regulating with, mandatory, 633.

NEWSPAPER OF GENERAL CIRCULATION —

- held to mean one circulating throughout the state, 400.

NEW TRIALS —

- statutes as to notice to give effect to limitations, 545.

NEXT OF KIN —

- meaning of, in statute, 400.
- statutes giving action to, for causing death, 710.
- illegitimate child not included in England, 710.
- otherwise in this country, 710.
- statutes allowing damages to, resulting from intoxication, 695-700.

NON-USER —

- will not repeal a statute, 246.

NOSCITUR A SOCIIS —

- the maxim of, and its application in the construction of statutes, 414-419.

NOTICE —

- of application for passage of law presumed, when required by constitution, 51.
- of application for private or local act, 78.
- presumption and proof of, in such case, 78.
- construed to be written, when, 374.
- when made necessary to create a duty to repair, not necessary to officer who caused defect, 372.
- when required of affirmative action, may also require of non-action, 372.
- if required to impose a duty, should be actual notice, 526.
- requirement of, as to limitations for new trial or appeal, 545.
- required by letter of statute, may be dispensed with when not within intention, 604.
- preliminary, when required to persons to be affected by proceedings, 631.
- publication of, mandatory in respect to redemption, 631.
- provisions as to, held directory, 624, 625.

OBJECT —

- of a statute, when plain, controls effect of particular words and expressions, 370-376, 427.
- of statute, may be considered for construction, 456.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

OFFICE —

whether power of appointment to, is executive, legislative or judicial, 4.

title of acts relating to, 155.

courts take notice of accession of persons to, and their tenure under the constitution and laws, 462.

a statute will not be given a retroactive effect to take away an office, 643.

will not apply to incumbents to exclude on account of advanced age, 643.

what is the sale of, 603.

when immemorial custom will make an exception, 603.

not held by contract, 662.

subject to legislative control, 662.

salary of, may be increased or diminished, 662.

may be vacancy in, before it has ever been filled, 714.

OFFICER —

title of acts relating to, 155.

not one who has gone out of office, 531.

construction of remedial act to prevent certain, from being interested, 683.

OFFICERS —

statutes impose duty on, by words importing power and authority, or permission, 634-640.

acts for protection of, liberally construed, 681.

construction of doubtful statutes relating to compensation of, 594.

repeal by implication of acts relating thereto, 261.

acts relating to fees and compensation of, strictly construed, 714.

construction of acts relating to election, appointment and qualification of, 714.

OFFICIAL ACTS —

statutory provisions concerning, directory as to time, 612-616.

OFFICIAL BONDS —

construction of remedial statute relative to actions for breach of, 593.

statutory requirements to facilitate proof of execution of, how construed, 604.

good, though not executed according to directions of statute, 626.

OPERATION OF STATUTES —

no extraterritorial effect, 13.

effect of foreign laws by comity, 13.

"OR" AND "AND" —

construed as if used accurately if according to intent, 397.

may be understood as used indifferently if intent require it, 397.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

ORDINANCE —

definition, 68.

municipal, not noticed by courts, 460.

passage of, not enjoined, 4.

ORPHAN —

may be construed in remedial statute by context and manifest intent to mean infant with living parents, 596.

OSTEOPATHY —

whether practice of medicine, 400, 721.

OWNER —

defined and construed, 400.

PALEY, DR. —

his views relative to separation of the legislative and judicial characters, 2.

PARI MATERIA —

when statutes are in such relation, 443-448.

general words in a later law often qualified by previous acts on same subject, 444.

new subjects introduced by general words will fall into established classifications, 444, 447.

"any person" in a later statute in, construed to harmonize with earlier one requiring certain qualifications, 445.

being in, does not warrant disregard of conflict in the later act, 447.

when statutes not in, 447.

act in relation to confinement of stock not in, with provisions as to speed of railroad trains, 449.

regard must be had to all parts of statutes in, 447.

statutes in, construed as a connected whole, 448.

a code relating to one subject governed by one spirit and policy, 448.

PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES, 18, 19.

PARLIAMENTARY PROCEDURE (31) —

constitutional regulations mandatory: 27, 44, 45.

PAROL EVIDENCE —

not admissible to impeach enrolled act or to show action of legislature, 47.

PARTNERSHIPS —

limited, act for formation of, liberally construed, 679.

PASSENGERS —

statutes depriving them of compensation for injuries received while riding on platform strictly construed, 547.

The references are to the sections: Vol. I, §§ 1-808; Vol. II, §§ 309-721.

PATENTS —

statutes for, liberally construed, 681.

PEDDLER —

held to include a book canvasser, 400.

PENAL DAMAGES —

given to injured party are intended to be part of his indemnity, 533.
are assignable, 533.

action for, not a criminal action and has none of its incidents, 533.

PENAL INSTITUTIONS —

title of acts relating to, 168.

PENAL LAWS —

of one state not enforced in another, 13.

effect of repeal of, 286.

repealing effect of statutes changing criminal laws, 252, 253.

repeal and re-enactment in same words a continuation, 252.

when part unconstitutional and part not so, 297, 299, 300.

must exist at the time of conviction, 286.

acts mitigating punishment, 286.

what are such, 337.

construed strictly, 337, 520-527.

statutes may be penal in part and remedial in part, 337.

construed strictly against accused and favorably for him, 337.

to be strictly construed according to severity of penalty, 518.

not to be so strictly construed as to defeat intention of law maker,
528-530.

should be so construed as to carry out the obvious intention, 526,
528.

words in, not to have narrowest interpretation, 529.

what statutes are penal, 531-533.

include not only such as provide for punishments pursuant to state
prosecutions, but all punitive statutes, 531.

and those prescribing punitive compensation to injured party,
531.

those which impose a burden or take away any right or benefit
of injured party, 531.

making tender of certain bills a bar to a demand, 531.

though beneficial not to be construed liberally, 531, 532.

acts penal and remedial, how construed, 532, 533.

revenue laws held not to be, 535.

to have a reasonable construction in aid of purposes of act rather
than a narrow one in the interest of those who violate it, 534.

when declared by same to be remedial will not be strictly construed.
684.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

PENALTIES —

- acts taking away, liberally construed, 630.
- when party may have vested right in, 286.
- lost by repeal of statute before judgment, 286.
- held to include injunctions, 400.

PERMISSIVE STATUTE (334) —

- when mandatory, 634-640.
- as to persons having right to invoke permissive provisions imperative, 636.

PERSON —

- meaning and construction of, 400.

PERSONAL REPRESENTATIVE —

- meaning of, in statute, 400.

PETITION —

- may consist of many duplicates signed separately and attached together, 400.
- the question of conflicting petitions under statutes for the organization of territory and the like, 719.

PICTURE —

- held to include photographic negative, 400.

PLACE OF TRIAL (see PROCEDURE) —

- construction of act when offense committed on board a boat, 639.

POLICE —

- statutes extending, control over private property or restraining use of, strictly construed, 543.
- never implied that the government has surrendered the police power, 548.

POLICY —

- of government, not safe rule for construction, 531.

POOL-SELLING —

- title of acts relating to, 165.

POWER —

- the legislative a distinct, 2.
- statutory, lost by repeal of statute, 285.
- when jurisdiction of court prohibited pending causes fall, 285.
- of sheriff to sell personal property includes right to take possession, 510.
- to create municipal debt includes power to levy tax to pay it, 510.
- to examine witnesses includes that to subpoena them, 503.
- those incidental granted with principal, 511.
- statutes granting, strictly construed, 562-564.
- granted to several all must act, 562.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

POWER (continued) —

- of officers in levying taxes and selling property for non-payment, strictly construed, 535-542, 562.
- and to be strictly followed, 563.
- given to a city to open and widen streets, but procedure only for laying out, is inoperative as to widening, 563.
- given to freeholders to make prudential rules for improving their common lands does not include imposing penalties on strangers, 563.
- of summary foreclosure by advertisement, 563.
- to towns to make donations to railroads, etc., not invalid because means of determining amount, etc., wanting, 563.
- such construction to be given as will answer intention, 563.
- grant of, generally implies reasonable means for exercise of, 563.
- act conferring powers recited in former act construed as embracing them, 563.
- when granted with reference to another act for definition, only includes the general power there recited, 563.
- special, conferred on a court, strictly construed, 564.
- when to be exercised according to existing law, 572.
- statutory, strictly construed, 549-558, 570.
- statutes granting, and prescribing how it is to be exercised, exclude any other mode, 627.
- affirmative words in such case imply a negative, 627.
- negative words in such case cannot be directory, 627.
- new grant of, by exercise of which one may be divested of his property, strictly construed, 627.
- to affect property, must be exercised in prescribed manner, 629.
- special, to be exercised by corporations, courts and officers substantially according to statute, 630.
- words importing, and authority, when imperative, 630.
- when mandatory, though permissive in form, 634-640.

PRACTICAL CONSTRUCTION —

- effect of in judicial construction of statute, 473-478.
- not lightly questioned, 474, 476.
- effect of, depends on long continuance, 477.
- only the interpreter of doubtful statute, 477.
- the length of time required to give strength to, 477.

PRACTICE —

- acts relating to, or changing, not *ex post facto*, 656.

PRAIRIE LAND —

- meaning of, in statute, 400.

The references are to the sections: Vol. I, §§ 1-309; Vol. II, §§ 309-731.

PREAMBLE —

- what is, 341.
- value of, for construction, 341, 342, 389.
- not part of law, 341.
- true office of, 341.

PRECEPTIVE STATUTE, 334

PRESENTATION —

- of bills to executive, 64.

PRESUMPTIONS —

- as to foreign laws, 13.
- that foreign law is the same as that where the court sits, 312.
- that enrolled act duly passed, 50.
- of existence of facts, on which power to legislate depends, 79.
- act presumed to have been duly passed, after lapse of ten years, 80.
- no presumption of the repeal of one statute by another, 247.
- that what is excluded from a statute by an exception would otherwise be within it, 351.
- not universal, 351.
- that proviso applies to preceding matter, 352.
- this removed by a different intention appearing, 352.
- that legislature proceeded with knowledge of existing laws, 355, 447.
- none that the government has surrendered any of its fundamental powers, 548.
- of principal's disability when deputy acts, 474.
- that legislature re-enacting statutes intended to adopt construction they have received, 499.
- that legislature did not intend any further change in existing law than is expressed, 499.
- nor to violate fundamental principles, 499.
- or oust jurisdiction of superior courts, 499.
- nor to surrender public rights, 499.
- that statutes are to be constructed by the common law, 499.
- that statutory powers are to be executed according to common law, 499.
- that discretionary power is to be reasonably exercised, 499.
- are conclusive or rebuttable, 496.
- that statutes duly authenticated are duly enacted, 496.
- passed from good motives, 496.
- that legislation is founded upon proper evidence, 497.
- facts recited cannot be disproved to invalidate a statute, 497.
- presumed that the legislature have not done a vain thing, 497.
- that the legislature intends its acts to be valid and have effect, 497.
- statutes presumed to be valid, 497.
- that the legislature is acquainted with the law, 499.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

PRINTING —

of bills and amendments thereto, 54, 55.

PRINTED STATUTES —

may be corrected by original act, 74.

PRIVATE GRANT —

words of, taken most strongly against the grantor, 548.

PRIVATE STATUTES —

definition, 331, 322, 327, 338.

not judicially noticed, 430.

notice of application for, 78.

PRIVILEGE —

public grants of, strictly construed, 549.

statutes conferring private, should not be so construed as to work public mischief, 558.

PROCEDURE —

change of, after commission of crime, may come within prohibition of *ex post facto* laws, 651.

acts to improve procedure remedial, 688.

giving right to bring action against insurance company at place where is the subject of insurance, 633.

act that trial judge file charge to jury of record, 688.

resort had to common law for, where statute giving a right or creating an offense is silent as to, 569.

where statutory fails, 570, 572.

PROCLAMATION —

of president, judicial notice of, by courts, 323.

PROHIBITION —

implied from penalty, 502.

from proviso that provision not be construed to permit, 510.

PROHIBITIVE STATUTE, 334.

PROPERTY —

public grants of, strictly construed, 548.

land grants by government construed strictly, 548-550.

PROSPECTIVE STATUTE, 335.

PROVISIONS —

definition and construction of, 400.

PROVISO —

what is, 351.

introduced to qualify or restrict general language, 345, 351-356.

totally repugnant to purview repeals it, 350.

repealed by statute which repeals the provision it qualifies, 351.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

PROVISO (continued) —

presumption that what is excluded from a statute by, would otherwise be within it, 351.

otherwise when introduced from abundant caution, 351.

what it applies to, 352.

does not apply to another section, unless intent appears, 352.

applies to the provision or clause immediately preceding, 352.

if irrelevant, has been rejected, 352.

strictly construed, 352.

it takes no case out of enacting clause which does not fall within its terms, 352.

matter of, may tend to enlarge purview, 352.

in penal statutes construed liberally for accused, 356.

applies to the provision or clause immediately preceding, 420, 421.

effect of void proviso on validity of entire statute, 306.

PUBLICATION —

to be in English, unless otherwise specified, 721.

PUBLIC GRANTS —

words of, construed most strictly against grantee, 548.

any ambiguity in, operates in favor of government, 548.

the presumption is against the government having parted with any of its powers for accomplishing its ends, 548.

against its having parted with any part of its sovereign power of legislation, 548.

or of police or taxing power, 548.

or power of eminent domain, 548.

in grant of land on implied covenant to do any further act, 548.

in grant of franchise to build a bridge or road, or to establish a ferry, no implied contract not to grant same to others, 549.

of power to incorporate does not include power to take land by devise, 557.

construction of, generally, 558.

construction of grant to city of right to use soil under road to lay pipes to convey water, 558.

of land bordering on tide water, 558.

PUBLIC OBJECTS —

liberal construction of acts for accomplishment of, 682.

PUBLIC PLACE —

meaning of, in statute, 400.

PUBLIC POLICY —

is what the legislature makes it, 85.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

PUBLIC RIGHTS —

- not deemed relinquished except by plain words, 558.
- not to be prejudiced by construction of statutes conferring private privilege, 558.

PUBLIC STATUTES —

- what are such, 194-196, 321, 327, 328.
- a statute establishing a municipal court is such, 194, 195.

PUNCTUATION —

- effect of, in construction, 361.

PURE FOOD LAWS —

- title of, 164.

PURVIEW —

- is the enacting part of statute, 246.

QUALIFYING WORDS AND PHRASES —

- to what they refer, 420, 421, 423.
- have been applied to several preceding sections, 420, 421.

QUORUM —

- majority is, 80.

RAILROAD —

- whether it includes street railroads, 400.

RAILROADS —

- title of acts creating or relating to, 146, 149.
- special and class legislation in respect thereto, 219.
- construction of statutes as to fencing tracks, 721.

READINGS OF BILLS —

- purpose of, 54.
- actual, required, 394.
- amendments do not require same readings as bills, 54.
- does not extend to everything which becomes law by the act, 54.
- requirement to read on separate days, 54, 55.
- what sufficient cause for dispensing with, not a judicial question, 55.

REAL ESTATE —

- held to include lease for years, 400.

REASONABLENESS —

- has a potent influence in construction, 488.

REBELLION —

- statutes enacted by states in, 21.

RECORD —

- remedial act that trial judge file of record his charge, 688.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

REDEMPTION —

- right of, liberally construed, 596.
- word "owner" used in generic sense in law of, 596.
- cannot be annulled by legislation, 671.
- right of, from tax sale a vested right, 672.

REDDENDO SINGULA SINGULIS —

- when general words so construed, 442.

RE-ENACTMENT —

- of statute which has received construction, 399.
- with change of phraseology, 401, 403.

REFERENCE —

- of bills, requirement as to, 54.
- adoption of statute by general, 405-407.
- confined to matter immediately preceding, 405-407, 409.

RELATIVE —

- held to include step-father, 400.

RELATIVE WORDS —

- their application or reference, 405, 409, 420, 421.

REMEDIAL STATUTES —

- to receive a liberal construction, 517, 518.
- may be extended to cases clearly within mischief, 519.
- giving penalty to aggrieved party remedial as well as penal, 532.
- when in part penal, how construed, 531-533.
- providing for arbitrations, 685.
- appeal or *certiorari*, 717.
- extending elective franchise, 680.
- taking away penalties 680.
- providing compensation to those whose property is compulsorily taken, 680.
- in favor of taxed persons, 680.
- of those affected by proceedings in derogation of their rights, 680.
- for protection of officers, 681.
- of married women, 681.
- of ship-owners, 681.
- for accomplishment of important public objects, 682.
- what are such, 336.
- liberally construed, 336.
- such construction when precluded, 336.
- statutes may be remedial in part and penal in part, 337.
- what are, for purpose of liberal construction, 582, 583, 679, 684.
- statutes such, unless excluded by some rule of construction, 584, 586.

The references are to the sections: Vol. I, §§ 1-808; Vol. II, §§ 809-721.

REMEDIAL STATUTES (continued) —

- letter of, may be extended to embrace cases within the mischief, 584.
- three points to be observed in construction of, 583.
- intention of to be carried out, 583.
 - more liberally inferred in construing such statutes, 583.
- construed liberally to reach mischief and advance remedy, 584, 585.
- cases not within intention excluded, 585.
- use of particular words will not be permitted to control evident intention, 599.
- what testamentary bond construed to include, 599.
- construction of statute of limitations, 702-708.
- how construed, 679-684.
- construed to carry out intent, 679.
- act to prevent delays in obtaining judgment, 686.
- act extending time, in exceptional cases, for presenting claims against decedent's estate, 687.
- act for execution of powers of will, by successor of executor, 687.
- act making void bequest to witness to will, 687.
- statutes intended to promote the convenience of suitors, 688.
 - to improve procedure, 688.
 - or promote public convenience, 689.
- provision that trial judge file of record his charge to jury, 688.
- for set-off of value of improvements, 688.
- act empowering court to decide about costs on commissions *de lunatico*, 688.
- provision that trial judge file of record his charge to jury, 437.

REMEDY —

- may be changed if right not impaired, 284.
- restored by repeal of law prohibiting, 284.
- when affirmative statute provides where one existed at common law, 331.
- rule where such statutes successively provide, 331.
- everything may be done consistently with any construction for that purpose, 605.
- but not where contrary intention clearly expressed, 605.
- statutes of limitation relate to, 668.
- no vested right in, 674.
- new remedy may be added to or substituted for those which exist, 674.
 - and applied to existing cases, 674.
 - subject, however, to a contrary intent appearing, and considerations of reasonableness, 674.
- governed by law of forum, 14, 15.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

REMEDY (continued) —

- given by statute, limited to strict statutory bounds, 565.
- not to be enlarged by construction, 565.
- only available on statutory conditions, 565, 566.
- when new given, one already existing, 572.
- liberal construction given to statutes to advance, 605.
- change of, as impairing contracts, 665-668.
- when statutory, exclusive, 720.
- whether civil or criminal proper, 721.

REMOVAL —

- of public officers, 714.

REPEAL —

- effect of amendment of repealed act, 233.
- effect of repeal and re-enactment, 238, 273.
- power of repeal, 244.
- modes of, 246.
- will take effect from any subsequent statute expressing intent, 246.
- the word repeal not necessary, 246.
- suspension not a repeal, 246.
- what is, 246.
- may be express or implied, 246.
- is express when declared in direct terms, 246.
- is implied when there is subsequent repugnant legislation, 246, 247.
- takes effect when repealing statute goes into operation, 246.
- when statutes profess to make a change repeal suggested, 246.
- repeal of all laws within purview is a repeal of all on same subjects, 246.
- repealing effect of invalid statute, 245.
- repugnancy of later statute causes repeal, 246.
- being ascertained, later act in date or position will prevail, 247, 280.
- repugnancy in principle or spirit not sufficient, 246.
- of unconstitutional provision has no effect, 246, 256.
- will not repeal private act, 246.
- non-user or custom will not repeal, 246.
- statute will not cease on removal of some of the evils aimed at, 246.
- statutes may be rendered inoperative by repeal of fundamental parts, 246.
- implied repeals, what are, 247.
- general principles in matter of implied repeals, 247.
- implied repeals ascertained as legislative intent is ascertained in other cases, by construction, 247.
- not favored, and only allowed to extent of repugnancy, 247.
- statutes not repugnant unless they relate to the same subject, 247.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

REPEAL (continued) —

difference in repealing effect between affirmative and negative statutes, 247, 248.

repugnance of any previous statute contrary to a negative statute readily seen, 248.

not so apparent in case of affirmative statutes, 248, 249.

when a statute gives an exclusive rule it implies a negative, 248.

when affirmative words imply a negative, 249.

repealing effect of affirmative statutes conferring power and regulating its exercise, 249.

new grant of part of power already possessed repeals residue, 250.

repeal by changing criminal law, 251.

common law is repealed as to a common law offense when it is defined and enacted by statute which also prescribes the punishment, 251.

change of elements of an offense or punishment a repeal, 251.

creation by statute of an offense consisting of some of the elements of an existing offense and others, no repeal of the existing offense, 251, 252.

if an offense identified by name or otherwise is altered in degrees or incidents it is repealed, 252.

where a new law covers whole subject of an old one, adds new offenses and prescribes different penalties, it is a repeal, 252.

a revision is an implied repeal, 252.

where act does not refer to old law, defines an offense punishable by old law and provides new punishment, it does not affect a past offense, 252.

no repeal where penalty reduced or place of confinement changed, 252.

granting a larger or a different power is a repeal of limitations, 254.

when exercise of new power requires grantee to go beyond previous limits, 254.

where new grant ignores former conditions, 254.

particular acts construed with reference to repeal by implication, 258-266.

acts relating to liquor traffic, 259.

acts relating to courts, jurisdiction, practice procedure, etc., 260.

acts relating to officers, their appointment, removal, fees, compensation, etc., 261.

acts relating to municipal corporations, 262.

acts relating to taxation, revenue, bonds, assessments, etc., 263.

acts relating to married women, 264.

acts relating to limitation of actions, 265.

miscellaneous cases, 266.

The references are to the sections: Vol. I, §§ 8-308; Vol. II, §§ 309-721.

REPEAL (continueJ)—

radical change in leading part of an act will repeal inconsistent provisions, 255.

restriction on bottomry loans impliedly removed on abolition of monopoly to which it was subsidiary, 255.

difference as to implied repeal where there is express repeal of inconsistent legislation, 256.

effect of clause repealing all acts and parts of acts inconsistent with new law, 256.

no repeal by re-enactment of part of act in another for a different scheme, 257.

nor will suspension of latter suspend the other, 257.

statutes adopted by reference not repealed by repeal of statute adopted, 257, 276.

instance of appointing election on county seat question at April election, and subsequent change of that election, 257.

presumption against implied repeal, and courts endeavor to harmonize statutes 258-267.

illustrations, 258-267.

repeals by implication avoided if possible, 267.

what constitutes repugnancy, 267.

implied repeal of one provision by another in same act, 268.

acts passed at same session deemed less likely to conflict, 268.

act imposing new regulations of existing duty has no repealing effect, 268.

an affirmative act providing a new procedure, cumulative, 268.

no repeal by passage of successive limitation laws, 268.

successive affirmative acts relative to venue may stand together, 268.

not sufficient to repeal that acts are different; they must be contradictory, 267.

as act presumed to be passed deliberately and with knowledge of existing laws, repugnancy must be irreconcilable, 267.

considerations of convenience, justice and reasonableness strong against implied repeal, 267.

repeal by revision, 269-272.

as a general rule whatever is excluded from the revised act is repealed, 270, 271.

apparent exceptions—effect of express repeal of inconsistent acts and parts of acts, 272.

effect of repeal and re-enactment, 273.

effect of re-enactment on intermediate acts, 273.

effect where different statutes are incorporated into a revision, 281.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

REPEAL (continued) —

- effect of general laws to repeal by implication those which are special or local, 274-279.
- the question is one of intent, 276.
- local and special acts held to be repealed by general acts, 277.
- held not repealed, 278.
- effect of constitutional provisions requiring general laws and laws of uniform operation upon repeal of special by general laws, 279.
- what is a later law which is potent to repeal, 280.
- provision later in position is such, 268, 280.
- effect of, without a saving clause, 282.
- indefinitely suspended while the repealing statute in force, 282.
- revival by repeal of repealing statute, 282, 288.
- inchoate rights lost by repeal, 283.
- otherwise if perfected by judgment, 283.
- rights arising on contract, when not affected by repeal, 284.
- vested rights not affected by, 284.
- causes of action barred by statute of limitations not revived by its repeal, 284.
- repeal of statute after judgment will not defeat an appeal previously taken, 284.
- repeal of statute essential to a judgment after repeal requires reversal, 284.
- repeal of statute prohibiting remedy restores it, 284.
- prohibiting defense of usury, repeals law of usury, 284.
- powers derived wholly from statute extinguished by its repeal, 285.
- proceedings in progress at time of repeal ended, 285.
- effect of, on penalty of forfeiture, 285.
- effect of, pending appeal, 284-286.
- operates as a pardon, 286.
- acts mitigating punishment, 286.
- effect of, on powers, jurisdiction and pending proceedings, 285.
- effect of repeal of penal statute, 286.
- effect of saving clauses and general saving statutes, 287.
- revival by repeal of repealing statute, 288.
- constitutional provisions as to repeals, 289.
- when statutes repealed by constitution, 290.
- validity of act to repeal a void act, 291.
- construction of express repeals, 292.
- errors and mistakes in express repeals, 293.
- effect of a statute and its repeal upon the common law, 294.
- miscellaneous points and cases as to repeals, 295.
- assumption of legislature that repealed act in force does not restore it, 295.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 809-721.

REPEAL (continued) —

- repeal of exception makes law general, 295.
- where one section is dependant upon another the repeal of the latter destroys both, 295.
- a statute continues until repealed though the reason for it ceases, 295.
- when added to unconstitutional act, 302.
- what are repealing statutes, 338.
- words expressing absolutely may be qualified by context, 371.
- effect of repealing statute adopted by general reference, 405.
- repealed statute may be considered in the construction of other statutes, 452.
- of statute, does not affect vested rights, 672.
- where is no express, none is presumed to be intended, 487.
- not presumed to change the law or existing institutions, systems or policies more than the terms of statute require, 487.
- of law giving jurisdiction takes away power to proceed in pending cases, 646.

RESIDENCE —

- defined and construed, 400.

RES JUDICATA —

- decision of case is, though not made in compliance with constitution, 620.

RETROSPECTIVE LAWS —

- such law giving illegitimates a right to inherit, presumed not intended to affect pending action in which plaintiff had no title at its commencement, 258.
- may take away defenses based on irregularities, 284.
- may validate contracts, 284.
- when obnoxious, 12, 335.
- when not unjust, 335.
- may have effect prejudicially on private interests, when not protected by constitution, 335.
- strictly construed, 580, 647.
- definition, 641.
- regarded with disfavor as generally unjust, 641.
- ex post facto* laws and laws impairing obligation of contracts prohibited, 641.
- statute should not be so construed as to affect existing rights, 642, 643.
- or impose new duties or obligations in respect of past transactions, 643.

The references are to the sections; Vol. I, §§ 1-308; Vol. II, §§ 309-731.

RETROSPECTIVE LAWS (continued) —

- statute will not be construed to take away a right to an office, 643.
- as by applying to incumbents new regulation as to age, 643.
- new record of deeds not applicable to existing deeds, 646.
- not necessarily invalid, 647.
- constitutional provisions forbidding, 648.
- what are *ex post facto* laws, 649-659.
- what laws impair obligation of contracts, 660-670.
- recording laws may apply to existing deeds, 663.
- contracts may be validated, 663.
- periods of limitation may be changed, 668.
- statutes which change the rule of evidence relate to the remedy, and do not impair the obligation of contracts, 667.
- a law abolishing distress for rent has been sustained, 667.
 - also imprisonment for debt, which is not considered as part of the contract, 667.
- statutes of limitation may be changed and affect existing cases, 668.
- statutes will not be construed to injure inchoate rights, if it can be avoided, 673.
 - nor to interfere with the existing course of business, unless the intention is clearly expressed, 673.
- remedial statutes which are retrospective, how construed, 674.
- continuing fact commencing before passage of act, and continuing afterwards, how affected, 674.
- statutes relating to procedure *prima facie* apply to existing cases, 674.
 - pending proceedings good as far as they have gone when new act takes effect, 674.
- legislature cannot create a legal liability out of past transaction, 673.

REVENUE LAWS —

- title of, 161.
- how construed, 535.
- tax laws construed strictly, 536.
- also statutes delegating the taxing power, 541.
- and statutes exempting from taxation, 539, 540.

REVISION —

- adoption of by reference, 75.
- repeal of, does not revive revised acts 288.
 - nor the common law, 294.
- what is, 269.
- implied repeal by, 269-272.
- to be alone consulted when the meaning is plain, 271, 281.
- when there is a conflict original acts consulted, 271, 450, 451.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 209-721.

REVISION (continued) —

- title of original act may be considered in case of doubt, 271.
- does not repeal exceptions in original law, 271.
- dates of original enactments will determine priority of parts, 281.
- resort to original acts in construction of, 450, 451.

REVIVAL OF ACTIONS —

- law for, against representatives *in pari materia* with law for appointment of executors and administrators, 449.
- construction of remedial statute for, on death of plaintiff, 591, 687.

REVIVAL OF LAW —

- by reference to title, 242.
- construction of constitutional provision forbidding, 242.
- repealed statute revived by repeal of repealing statute, 282, 288.
- otherwise where constitution requires new act to contain revised law, 288.
- repealing a statute revives common law, 294.
- where repealing statute substitutes other provisions, 288.
- may be made to depend on contingent event, 288.
- where act expressly revived, how to be construed, 288.
- incomplete proceedings, made void by repeal, not revived by revival of statute, 288.
- repeal of revision does not revive revised acts, 288.

RIGHTS —

- law at the time of their accrual governs, 12.
- statutory, inchoate when, 12.
- under foreign law, 14, 15.
- remedy to enforce, governed by law of forum, 15.
- when statute creates, effect on existing, 331.
- in action, plaintiff should have title when suit brought, 258.
- statutory right, while inchoate, lost by repeal, 283.
- distinguished from remedy, 284.
- when vested under statute while in force, not destroyed by repeal, 284.
- effect of repeal on statutory, while inchoate, 283.
- statutes against common right strictly construed, 542, 543.
- public, not treated as relinquished by inference, 558.
- statutes conferring new, strictly construed, 632.
- prescribing mode of enforcement mandatory, 632.
- regulating existing, with negative words, mandatory, 633.
- liberal construction of acts for persons affected prejudicially by favors granted to others, 680.
- inchoate, are subject to legislation, 673.
- new remedy may be provided for existing, and added to or substituted for those which exist, 674.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-731.

RIGHTS (continued) —

- vested, not to be legislated away by curative statutes, 675.
- not meritorious which rest upon defects, 675.
- if jurisdictional facts are wanting, the proceeding cannot be sustained nor cured, 676.
- the proceeding will be fatally and incurably defective, 676.
- common law; not taken away unless intention clear, 573.
- whether rights once barred may be revived, 708.
- when new rights created and no remedy provided, common law remedies apply, 720.

RIGHTS AND EFFECTS —

- held to include shares of stock, 400.

ROAD —

- held to include city street, 400.
- franchise to build not construed to be exclusive, 549.
- grant to plank-road company to lay its road on established highway implies no power to take exclusive possession, 549.

ROADS AND STREETS —

- title of acts relating to roads, bridges, ferries, etc., 157.
- are a subject of a general nature in legislation, 223.

RULE OF ACTION —

- how applied judicially, 10.
- prescribed by the legislature, 11.

RULE OF CIVIL CONDUCT —

- what is, 8, 9.

RULE OF PROPERTY —

- when doubtful statute construed by inferior courts and has become a, 472.
- practical construction binding when it has become a, 474.
- constructions which are, strongly adhered to, 480, 483, 484.

RULES —

- of legislature as to procedure in legislation, 76.

RULES AND REGULATIONS —

- authority to make, whether a delegation of legislative power, 89.
- of department, judicial notice of, 323.

SALARY —

- not changed by appropriation being made of a less sum, 261.

SALE —

- of real estate on execution, statute requiring certificate of to be filed, directory, 623.
- requirement that execution, be made at court-house, mandatory, 629.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

SALOON —

definition of, 400.

SAME SESSION —

laws passed at same session deemed less likely to conflict, 268, 443.

SAVING CLAUSE —

construction and effect of, in case of repeal, 287.

general saving statutes, their construction and effect, 287.

what is, 225, 351.

is void if totally repugnant to purview, 350, 357.

generally restricts repeal, 354.

strictly construed, 354.

in penal acts provisos and exemptions in favor of accused liberally construed, 356.

general intent of repeal cut down by special intent in saving clause, 354.

its effect, 354.

a general saving law will have effect unless a different intent is manifested in subsequent repeals, 355.

general excluded by special, 491.

general provisions will operate, 491.

express saving, exception or exemption excludes others, 494.

SCHOOLS —

title of acts relating to schools, school districts, etc., 154,

special legislation in respect thereto, 218.

SEA SHORE —

grants of, how construed, 558.

act to incorporate city bordering on, vests no part of, 558.

SEALED BIDS —

statutes regulating, mandatory, 632.

SENTENCE —

change in mode of executing, not *ex post facto*, 659.

SESSIONS OF LEGISLATURE —

time and length of, prescribed in constitution, mandatory, 27.

must be held at proper place, 27.

SET LINE —

in game law, defined and construed, 400.

SET-OFF —

remedial act allowing, of improvements, 688.

SHALL —

when permissive, 640.

SHALL BE LAWFUL —

when mandatory, 634-639.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-731.

SHIP-OWNERS —

construction of act mitigating rules of common law in favor of, 681.

SIDE TRACKS —

in tax law, construed, 400.

SIGNING —

of bills by presiding officers, 56.

"SINGLE MAN"—

may be made by context and manifest intent to include unmarried woman, 592.

"SINGLE WOMAN"—

may be made by context and manifest intent to include married woman, 593.

SINGLE SUBJECT OF STATUTES (see TITLES OF STATUTES).

SINKING FUND —

definition of, 400.

SLANDER —

held to include libel, 400.

SLAVE MARRIAGES —

act to validate liberally construed, 679.

SOLDIERS AND SAILORS —

acts granting special privileges to are class legislation, 223.

SOVEREIGNTY —

every nation possesses exclusive within its own territory, 14.

what it extends to, 14.

all residents subject to it, 14.

local law governs acts done, contracts made, etc., 14.

how change of, affects the laws, 20.

is in the people, 44.

grant of right to sue state strictly construed, 558.

SPECIAL ASSESSMENTS —

power to levy strictly construed, 541, 542.

SPECIAL LAWS (see GENERAL, SPECIAL AND LOCAL LAWS).

prohibition of in constitution, 189, 193.

object of prohibition, 194, 199.

definition, 194, 199.

local laws are special as to place, 199.

legislature has power to pass special and local laws in the absence of constitutional inhibition, 192.

invalidity of unequal special laws, 192.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-731.

SPECIAL LAWS (continued) —

- prohibition of, on enumerated subjects is an implied requirement of general laws, 199.
- whether act general or special — general principles, 200.
 - not a question of form, 200.
 - how determined, 200.
- effect of repeal of part of special act, 229.
- special laws may be repealed though special legislation is forbidden, 229.
- effect of general laws to repeal by implication, 274-279.

STANDARD TIME —

- whether intended in statute, 716.

STARE DECISIS —

- statutory constructions should be adhered to, 475, 477.
- when a point has been once settled it should be adhered to, 479.
 - to give stability to law, 479.
- precedents have effect on legal science as experiments in philosophy, 479.
- decisions have effect beyond the particular case, 479.
 - they become authority, 479.
 - the highest evidence of what the law is, 479.
- distinction between precedents which are rules of property and those which are not, 480, 481, 483, 484.
- will be regarded as a rule of property if its nature is such or will operate to become such, 484.
- no absolute rule when imperative, 483.
- when departed from there is a thoughtful comparison of consequences, 482.
- two grounds for departing from a single decision, 483.
- applicable to constitutions and statutes, 483.
- applies only to decisions on points involved in causes, 483.
- applies not always to the reasoning, but only the conclusion and whatever that necessarily involves, 486.
- there is no effect on questions not decided, though they might have arisen, 484.
- a judicial construction of statutes becomes a part of them, 485.
 - and rights which have attached under a construction, especially under contracts, cannot be divested by a change, 485.
- contract rights are protected by the federal constitution from such impairment, 485.
- a decision of the supreme court is law of the case in its subsequent trial and proceedings, 487.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

STATE —

- bound like a natural person by its contracts' 661.
- its contracts protected from impairment like contracts of private persons, 663.
- in national banking act, held to include territory, 400.

STATUTE OF FRAUDS —

- applicable to prior contracts, may impair their obligation, 660.

STATUTE OF LIMITATIONS (see LIMITATIONS).

STATUTES (see CONSTRUCTION, DIRECTORY STATUTES, GENERAL, SPECIAL AND LOCAL LAWS, INTENTION, LIBERAL CONSTRUCTION, MANDATORY STATUTES, REPEAL, RETROSPECTIVE LAWS, STRICT CONSTRUCTION, TITLES OF STATUTES) —

- general nature of, 8-12.
- have no extraterritorial effect, 13.
- effect of foreign statutes and laws, 13.
- extraterritorial effect in case of colonization, 16.
- continuance after change of sovereignty, 20.
- of states in rebellion, 21.
- domain of federal and state statutes, 22, 23.
- statutes of one state foreign to other states, 23.
- state statutes not foreign to general government, 23.
- construction of state laws by state courts followed by federal courts, 22.
- construction of federal, by federal supreme court binding on state courts, 22.
- judicial notice of state statutes by federal courts, 23.
- how existence of, established — English rule, 28-30.
- common-law record of, 28.
- no plea denying admitted, 28, 58, 59.
- validity of, how tried, 28, 44-53, 57-59, 310.
- how question of existence raised and decided, 28, 57-59.
- legislative record, 29.
- whether journals may be resorted to to impeach enrolled act, 30-53.
- journals as evidence, 45.
- unreliability of journals, 46.
- courts holding enrolled act conclusive, 32-43.
- courts holding enrolled act not conclusive, 44.
- journals may be consulted for parliamentary history of, 47.
- absence of provision for verifying all proceedings necessary to due enactment of, 44, 50-52.
- enrolled act can only be impeached by journals, 47.
- parol evidence for that purpose not admissible, 47.
- will not be declared void on facts admitted by parties litigant, 49, 82.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 379-721.

STATUTES (continued) —

- enrolled act presumed to have been duly passed, 50.
- notice of application for, presumed, 51.
- enrolled act not impeached by silence of journals, 51.
- what sufficient showing to impeach enrolled act, 52.
- effect of absence from journals of what constitution expressly requires to be entered, 53.
- necessity of signature of presiding officers, 56.
- how the question of the due passage of, is tried, 57-59.
- required reading, printing and reference of bills, 54, 55.
- passage of law held to mean enrollment, 60.
- approval of, by executive, 60.
- how bill will become a law without approval, 61.
- recalling bill after presentation to governor, 61.
- signing need not be at end of bill, 60.
- whether governor may revoke approval, 60.
- computation of time in matter of presentation, approval and return of bills, 60-64.
- presentation of bill to executive, 64.
- veto and passage over veto, 64.
- what may be passed at extra session, 65.
- amendment and substitution after time for introduction of bills has expired, 66.
- forms of legislation, 67, 68.
- bill, act, ordinance, resolution, 67, 68.
- enacting style of laws, 69-73.
- enrolled act conclusive as to words of statute, 74.
- adoption of code or revision by reference, 75.
- effect of statutory requirements as to procedure in the enactment of laws, 76.
- effect of legislative rules as to procedure in enactment of laws, 76.
- act not invalid for failure to comply with legislative rules in passing, 76.
- notice of application for private or local acts, 78.
- when power to enact, is conditioned on the existence of certain facts, 79.
- recitals of fact in, 79.
- act conclusively presumed to have been duly passed after lapse of ten years, 80.
- invalid act held validated by reference to it as a law, 80.
- validity of in general, 81-86.
- courts will not act upon admission of parties as to procedure in passing law, 82.
- presumed to be valid, 82, 479.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

STATUTES (continued) —

- all doubts resolved in favor of validity, 82.
- validity of, not passed upon in advance of their taking effect, 82.
- construed, if possible, so as to be valid, 83.
- not void for fraud or conspiracy in passing, 84.
- question of justice, wisdom, reasonableness and policy of, not for courts, 85.
- are valid unless in violation of some express provision of the constitution, 85.
- when void for uncertainty, 86.
- power to suspend, 90.
- acts held to be a delegation of legislative power, 93.
- acts held not to be a delegation of legislative power, 94.
- whether operation of may be made to depend on popular vote, 96-105.
 - on contingency, 96-106.
 - on foreign legislation, 100.
 - on conduct of foreign nations to be ascertained by president, 101.
- operation of dependent upon local adoption, 102-104.
- invalid when passed, always invalid, 107.
- one not affected by invalidity of, cannot raise question, 107.
- courts take judicial notice of all facts affecting validity of statute, 107.
- not declared invalid on admissions of parties. 107.
- validity of, to be tested by what may be done under them, 107.
- miscellaneous cases on validity of, 107.
- acts done under invalid, 108.
- constitutional requirements as to subject and title, their construction and application, 109-171.
- are restrained and qualified by title, 120, 135.
- take effect from date of passage unless other date specified, 106, 172.
- date of passage is date of last act in process of enactment, 172.
- purpose of specifying future commencement, 172.
- formerly acts of parliament took effect from beginning of session, 173.
 - has been changed by statute, 173.
 - same rule recognized in North Carolina, 174.
- legislature may fix future day for act to take effect, 175.
- speak from the day they take effect, 175.
 - and from the first moment of that day if it be a future day, 184.
- if they take immediate effect, they commence to operate at the precise time of passage, 179.
- taking effect on publication, 178.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

STATUTES (continued) —

- effect of general statute fixing future date for acts to commence, 175.
- supplemental act taking immediate effect may give such effect also to the original act, 175.
- constitutional provisions regulating the time of acts taking effect, 176, 177, 178.
- are mandatory, 176.
- emergency clause, 176.
 - in the absence of emergency clause when required time of taking effect not shortened, 176.
- constitutional provision requiring legislature to fix time for statutes to take effect, 177.
- time of taking effect — fractions on a day, 179.
- acts approved on the same day, 180.
- miscellaneous points and cases, as to taking effect, 181.
- constitutional provisions prohibiting local and special laws and their construction, 189-229.
- validity of acts which adopt or make applicable the provisions of other acts, 243.
- duration of, 244.
- amendatory acts, 230-243.
- repeals and repealing acts, 244-295.
- repealing power, 244.
- repeals express and implied, 244-295.
- negative statute is one expressed in negative terms, 247.
- affirmative statute is one expressed in affirmative terms, 247.
- repealing effect of unconstitutional statute, 245.
- what penal laws include, 251.
- where statute changes punishment of common-law offense it is still a common-law offense, 251.
- repealed statute not restored by assumption of legislature that it is in force, 295.
- though reason for statute ceases, the statute continues in force, 295.
- statutes void in part, 296-308.
 - may be good in part, 296.
 - general rules and principles for determining whether void in toto, 297.
 - rule when physical severance is impossible, 298-300.
 - whether words and provisions may be severed in their application or scope, 298.
 - such severance not made in case of criminal statutes, 299, 300.
 - if main purpose unconstitutional, whole act void, 301, 302.
 - when void part is inducement to, or consideration of residue of act, whole void, 303, 304.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

STATUTES (continued) —

- in order that part may stand it must be complete in itself and accord with legislative intent, 305.
- effect of void exceptions, provisos, restrictions, etc., 306.
- if act intended to operate as a whole, part cannot stand, 307.
- miscellaneous acts held severable and valid in part, 308.
- judicial notice and proof of, 309-323.
- recitals in, effect of, 322.
- classification and description of statutes, 324-338.
 - names of statutes, 324.
 - ancient statutes of England, 325.
 - federal, state, territorial and colonial statutes, 326.
 - public and private statutes, 327, 328.
 - declaratory statutes, 329, 330.
 - affirmative and negative statutes, 331-333.
 - perceptive, prohibitive and permissive statutes, 334.
 - prospective and retrospective statutes, 335.
 - remedial statutes, 336.
 - penal statutes, 337.
 - repealing statutes, 338.
- parts of a statute and their relations, 339-362.
 - the title, 339, 340.
 - the preamble, 341, 342.
 - the enacting style, 343.
 - the purview, 344.
 - exceptions and provisos, 345, 351-356.
 - saving clauses, 354, 355.
 - interpretation clauses, 358-360.
 - punctuation, 361.
 - headings and marginal notes, 362.
- the intent of a statute is the law, 363.
- to find intent, the object of all interpretation, 364.
- intent first sought in language of act, 366.
- courts have no concern with policy or expediency of statutes, 366.
- whether expressed in general or limited terms, legislature to be taken to mean what it has plainly said, 366.
- a different intent is not thus to be imputed to legislation to serve any supposed policy or to maintain its validity, 367.
- to be read so as to harmonize and give effect to all their parts, 368-376.
- every part to have effect, 369, 380.
- literal import not to govern against evident intention, 370-376.
- intention declared in, controlling, 376.
- to carry out intent words enlarged or restricted, 381.
- or deemed inserted, 382.

The references are to the sections: Vol. I, §§ 1-808; Vol. II, §§ 809-721.

STATUTES (continued) —

- or one word substituted for another, 383.
- or words disregarded or eliminated, 384.
- or transposed, 386.
- there can be no intent of a statute not expressed in its words, 388.
- interpretation of words and phrases, 389-400.
- implied exceptions to general language, 385.
- value of recitals in construction, 389.
- prohibitory statutes not construed on principles of leniency, 395.
- prohibited things not void for their tendency, 395.
- user of words in, 399.
- re-enacted after receiving construction, 399.
- effect of re-enacting with change, 401-403.
- every change does not indicate a change of intent, 401.
- word "statute" held to include a freeholders' charter, 400.
- adopting statute from another state adopts construction, 404.
- adoption of, by general reference, 405-407, 563.
- confined to object of adoption, 405-407.
- effect of repeal after adoption, 405.
- effect of incorporating existing statute in a new one, 405-407.
- not vitiated by bad grammar, 408, 409.
- may be fatally vague and ambiguous, 411.
- mistakes, their correction and effect, 410-413.
- maxim *noscitur a sociis* and its application in the construction of statutes, 414-419.
- relative and qualifying words and phrases, 420, 421.
- doctrine of *ejusdem generis* and its application in the construction of, 422-441.
- reddendo singula singulis*, 442.
- in pari materia*, 443-449.
- to be construed with reference to whole system of which it is a part, 444.
- doubtful provisions not to be construed in conflict with general principles, 447.
- modified expressly or by implication by later legislation, 447.
- doubtful provision not construed to conflict with general principles, 447.
- resort to original acts in the construction of revisions and codifications, 450, 451.
- repealed or invalid statute may be considered in the construction of other statutes, 452.
- interpretation with reference to the common law, 453-455.
- or fundamental rights, 454.
- object of, has potent influence in construction of, 456.
- state, in federal courts, 457.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

STATUTES (continued) —

- judicial knowledge as a factor in construction, 457-469.
- whether proceedings in the legislature such as amendments, debates, committee reports, etc., may be taken into consideration in construction, 470.
- courts will judicially take notice of history of act in process of enactment for certain purposes, 471.
- to be read in view of surrounding facts, 471.
- when object may be learned from another document, 471
- contemporaneous construction of, 472.
- general usage and practical construction, 473-473.
- practice inconsistent with, cannot repeal, 473.
- doctrine of *stare decisis* in connection with the construction of statutes, 479-486.
- effects and consequences as affecting construction, 487-490.
- doctrine of *expressio unius est exclusio alterius*, 491-495.
- presumptions, 496-499.
- duly authenticated, presumed duly enacted, 496.
- except where by organic law it is provided otherwise, 496.
- expediency and moral justice of, not considered by courts to affect validity, 496.
- facts assumed by act cannot be disproved to invalidate, 497.
- act creating county cannot be invalidated by disproving required population, 497.
- presumed to be intended to have effect and capable of it, 497
- presumed valid, 497.
- every intendment made in favor of, 498.
- specific prevails over general, 491.
- in derogation of existing law strictly construed, 499.
- implications and incidents, 500-512.
- public, noticed by courts, 502.
- private, not noticed, 502.
- are deemed to refer and apply to persons and things within the state and within the power of the legislature, 513.
- whether state or public corporations embraced by general words of statute, 514.
- effect of mistake of legislature as to existence, application or effect of a statute, 515.
- miscellaneous cases and points in the construction of statutes, 516.
- strict construction, 517-531.
- construed with reference to object or purpose, 517.
- construction rests upon many rules, 518.
- penal, strictly construed, 520-527.
- cannot be extended by implication, 521.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

STATUTES (continued) —

- strict construction applies whether statute refers to description of the offense, the penalty or procedure, 523.
- what statutes are penal, 531-533.
- miscellaneous cases on the construction of penal statutes, 534.
- revenue laws, how construed, 535-541.
- exemptions from taxation strictly construed, 539, 540.
- acts delegating power of taxation, 541.
- against common right strictly construed, 542, 543.
- of limitations, 544.
- fixing limitations of right to move for new trial or to take appeal, 545.
- interfering with legitimate industries, how construed, 546.
- creating or increasing liability, 546, 547.
- for discharge of insolvent debtors, 547.
- public grants, construction of, 548, 550, 558.
- grants of franchises and privileges, 549.
- acts creating corporations or granting power thereto, 551-557.
- eminent domain statutes, 558-561.
- statutes granting power, 562-567.
- specific regulations in general law adopted by general reference in local act, how affected by subsequent changes, 563.
- adoption of, by general reference, 563.
- construction of acts relating, to jurisdiction of courts, 568, 569.
 - conferring statutory rights, 571, 572.
 - in derogation of the common-law, 573-575.
 - retrospective laws, 580.
 - acts affecting previous statutory policy, 581.
- interpretation clauses, 576-579.
- every part of, should have a reasonable effect, 571.
- authorising persons to sue *in forma pauperis*, 571.
- giving action to widow and next of kin for negligently causing death, 571.
- liberal construction, 582-609.
- of remedial statutes, 583, 679-684.
- construction of insolvent act as to voluntary conveyances, 595.
 - act providing compensation of public officers, 594.
- when intended for the protection of purchasers and creditors, not applicable to others, 602.
- whether directory or mandatory, 610-640.
- provisions held directory, 612-616, 618-626.
- statutory provisions held mandatory, 617, 627-640.
- permissive, whether mandatory, 634-640.
- statutory direction to secretary of state to publish, directory, 623.
 - to make plan of drainage before directing work to be done, directory, 623.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

STATUTES (continued) —

- retrospective, 641-648.
- ex post facto* laws, 649-659.
- impairing obligation of contracts, 660-670.
- interfering with vested rights, 671-674.
- curative, 675-677.
- whether they create a contract with the state, 670.
- particular statutes construed, 678-721.
 - remedial, 679-684
 - arbitration, 685.
 - acts relating to judicial procedure, pleading, practice, etc., 686-689.
 - mechanics' lien statutes, 690.
 - other lien laws, 692.
 - exemption statutes, 693.
 - attachment and garnishment statutes, 694.
 - civil damage acts, 695-700.
 - selling liquor to minors, 701.
 - statutes of limitation, 702-708.
 - election and ballot laws, 709.
 - wrongful death, 710.
 - married women's acts, 711.
 - other acts relating to husband and wife, 712.
 - game laws, 713.
 - acts relating to public officers, 714.
 - requiring majority vote, 716.
 - relating to appeals and writs of error, 717.
 - to costs, 718.
 - petitions for organizing new counties, 719.
 - giving new rights and remedies, 720.
 - miscellaneous acts, 721.
 - federal statute a rule for all and not to be construed by conditions in one state, 721.

STATUTORY DEFINITIONS —

- apply where a statute does not otherwise interpret itself, 360.
- their general application, 360.
- special statutory definitions exclude all others, 360.
- not applicable to pleadings on the statute to which they apply, 360.

STATUTORY LAW —

- definition of, 7, 8, 9.
- what included in, 8, 9, 12.
- cannot be extended to govern existing cases, 12.
- has no extraterritorial effect, 13.
- essential that there be a legal legislature, 27.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

STATUTORY LIEN —

has only common-law incidents, 454.

STATUTORY POLICY —

strict construction, to prevent overturning established and well defined, 581.

general language will be construed in harmony with, 581.

STATUTORY PROCEEDINGS —

must be conformable to statute, 630.

every act which is jurisdictional, or of essence of proceedings, or for benefit of party affected, mandatory, 630.

certificate of justice of death of infant's father, as a prerequisite to mother's consent to apprenticeship, 630.

every material requirement of statute to be followed in exercise of power of eminent domain, 630.

provision that work under municipal charter be let to lowest bidder, mandatory, 631.

STATUTORY RIGHTS —

depend on statutes creating them, 571.

to recover for death caused by negligence, 571.

statutes for accommodation of particular citizens or corporations, 571.

to sue *in forma pauperis*, 571.

to detain trespassing animals, 571.

for allowance of gratuitous credits against debt to state, 571.

mechanic's lien law, 571.

to obtain summary judgment, 571.

as to mode of obtaining compensation for property taken for public use, 571.

statutes regulating, mandatory, 632, 633.

STAY LAWS —

construction of as to impairing obligation of contracts, 667.

STOREHOUSE —

in statute, construed, 400.

STORY, MR. JUSTICE —

his views of the separation of fundamental powers, 3.

STREET —

held to include alley, 400.

STRICT CONSTRUCTION —

best to follow reason and rule of common law, 454.

statute in affirmance of the common law construed by it, 455.

extraneous facts in aid of, 456.

object of statute has potent influence in, 456.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

STRICT CONSTRUCTION (continued) —

- contemporaneous, 456.
- object of statute considered, 456.
- extrinsic aids in, 456.
- compared with liberal, 517-519, 532, 533.
- not precise converse of liberal construction, 518, 519.
- applied to penal laws, 535.
- does not embrace a case not within letter, 519, 521, 526.
 so if not within the intention, 521.
- not so applied as to defeat intention, 519-521, 528-530.
- of penal statutes, 520-534.
- not opposed to application of common sense, 521.
- applies to description of offense, penalty and procedure, 524.
- statute not to be extended beyond grammatical sense on a plea of
 failure of justice, 524.
- penalty not inflicted if meaning in doubt, 524.
- if notice necessary to impose a duty it must be actual notice, 526.
- doubts on reading statute to be resolved in favor of accused, 524.
 529.
- ambiguities not to be imagined in order to apply a lenient construction, 529.
- of revenue statutes, 535-541.
- of statutes which impose taxes, 536-538.
 or exempt from taxation, 539, 540.
 or delegate the taxing power, 541.
- of statutes against common right, 542, 543.
- of limitations, 544.
 limiting right to move for new trial or take appeal, 545.
 interfering with legitimate industries, 546.
 creating liability, 547.
- of public grants, 548-558.
- of delegation of power to corporations, 549-558.
 eminent domain, 559-561.
- of statutes granting power, 562-564.
 providing new remedy, 565, 566.
 summary proceedings, 566.
 new methods of proof, 566.
 methods of appeal, 567.
 exceptional methods of obtaining jurisdiction of parties,
 567.
- of new procedure for new offense, 569.
- of statutory rights, 570-572.
 statutes in derogation of common law, 573-575.
- when interpretation clause strictly construed, 576-579.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

STRICT CONSTRUCTION (continued) —

of retrospective laws, 580, 647.

of statutes to prevent interference with well defined and established statutory policy, 581.

applied to statutes granting new right, privilege or immunity, 632.

STRUCTURE —

defined and construed, 400.

held not to include fence in penal statute, 525.

SUBJECT (see **TITLES OF STATUTES**) —

construction of constitutional provision as to expressing, in title, 109-171.

SUBJECT-MATTER (see **TITLES OF STATUTES**) —

of statute, controlling effect of in construction, 347.

general words may be restrained to it, 347.

words of narrower import expanded to it, 347

general provision in appropriation act presumed temporary, 347.

act giving pilot's lien construed not to apply to government vessels, 347.

general saving clause limited to acts repealed by same act, 347.

exemption in revenue law limited to taxes provided for in same act, 347.

SUIT —

defined and construed, 400.

SUITORS —

acts remedial which are intended to promote convenience of, 688.

SUMMARY PROCEEDINGS —

statutes for, strictly construed, 336, 566, 572.

SUNDAY —

whether included or excluded in the computation of time, 188.

whether Sunday laws are class legislation, 225.

SUPPLEMENTAL ACTS (see **AMENDATORY ACTS**),

SUSPENSION —

of statute by president, 101.

SURETY —

held endorser not, 400.

TAXATION —

statutes authorizing, or delegating power of, construed strictly, 535-541.

also exemptions from, 539.

never implied that the government has surrendered the power of, 548.

title of acts relating to, 161.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

TAXATION (continued) —

- laws relating to must be of uniform operation, 228.
- repeal by implication of acts relating thereto, 263.
- may include special assessment, 400.
- statutory provisions as to, whether directory or mandatory, 613.
- construction of acts and provisions as prospective or otherwise, 645.
- acts validating tax sales, 677.

TAX-PAYER —

- provisions for protection of, mandatory, 627, 628.
- publication of notice as to time of redemption, 631.

TECHNICAL WORDS —

- when used technically to be construed according to technical meaning, 389, 395, 398.
- in the sense generally accepted among those engaged in the trade, etc., to which they apply, 393.

TELEGRAPH —

- includes telephone, 400.

TENDER OF ENGINE —

- held not a car, 400.

TENSE —

- of statutes not always followed, 409.

TERM OF COURT —

- meaning of, 400.

TERRITORIAL DIVISIONS —

- established by public statutes judicially noticed, 459.

TERRITORIAL LAWS —

- power of congress to legislate for territories, 24, 25, 326.
- validity of, 24.
- must be reasonable, 24.

TERRITORIES —

- power of congress to legislate for, 24, 25.
- nature of government in, 25, 26.

TESTAMENTARY BOND —

- what construed to include, 599.

TEST OATH —

- statute requiring of suitors, strictly construed, 543.
- statute requiring in respect to past acts, *ex post facto*, 652.

TIME —

- Computation of, generally, 184-188.
- computation of, in matter of presentation and approval of bills, 60-64.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

TIME (continued) —

- meaning of words "now," "heretofore," "hereafter," "from and after the passage of this act," etc., 183.
- provisions requiring official acts directory as to, 612-616.
- provisions as to, held mandatory, 617.
- construction of words and provisions relating to, 716.
- meaning of "day," "month," "week," 716.
- whether standard or sun time intended by statute, 716.

TIME WHEN STATUTES TAKE EFFECT, 172-188, 280.

TITLE—

- acquired by laws of one country good everywhere, 14.

TITLES OF STATUTES —

- territorial act not within title, valid if approved by congress, 24.
- constitutional requirement to express subject of act, 109, 110.
- purpose of these provisions, 111.
- mischief intended to be remedied thereby, 111.
- held mandatory, 112-114.
- liberally construed to sustain legislation not within the mischief, 115.
- distinction between *subject* and *object* of statute, 116.
- what is the subject or object, 116.
- scope of subject—general and comprehensive titles, 117.
- if title restrictive, act must be kept within it, 117.
- the required unity, 117.
- no objection that subject only partially treated, 117.
- all the provisions must be germane to subject, 118.
- and not broader than the title, 118.
- whatever is germane to subject expressed is within title, 118.
- indispensable part of every act, 119.
- how subject required to be stated in, 119, 121.
- must be as comprehensive as the subject, 120.
- and broad enough to cover all the provisions, 120.
- the purpose for which title must express the subject, 121.
- requisites of title generally, 121.
- need not be an index to act, 121.
- the degree of particularity in expressing the subject left to discretion of the legislature, 121.
- form of statement not material, 121.
- effect of "etc.," "and so forth," "and for other purposes," in title, 122.
- title misleading by reason of generality, 123.
- may be broader than act, 124.
- no objection that act not as broad as title, 124.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

TITLES OF STATUTES (continued)—

- misleading titles, 125.
- whether title should accompany bill in its passage, 126.
- title and act liberally construed to sustain legislation, 127, 128.
- subject stated generally includes incidents and subsidiary details, 129.
- and the abolition of things inconsistent, 130.
- and whatever may contribute to accomplishment of object, 129.
- effect when title expresses a general subject and also details, particulars or sub-titles, 131.
- whether latter a limitation, 131.
- effect of title referring to act or other sources of information, 132.
- errors in title, 133.
- whether title may be corrected by act or otherwise, 133.
- subject may be expressed by the description of its parts or subdivisions, 134.
- words of statute are restrained and qualified by title, 135.
- expression of purpose to prohibit, regulate, protect, etc., includes penalties and civil liabilities, 136.
- effect of error or uncertainty in, 138.
- title of amendatory and supplemental acts, 137-142.
 - general principles, 137.
 - if title is to amend generally may include whatever is germane to title of original act, 137.
 - need not specify nature of amendment, 137.
 - effect of error or uncertainty in, 138.
 - effect of specifying section or sections to be amended, 139.
 - whether same a limitation, 139.
 - effect of title indicating amendments to be made, 140.
 - whether same a limitation, 140.
 - whether title identifying section to be amended is sufficient without giving title or subject of act amended, 141.
 - references to codes and compilations, official and otherwise, in title, 141.
 - miscellaneous cases and points, 142.
- duplicity in act or title, 143, 144.
- provisions not within title are void, 145.
 - examples, 145.
- if act and title contain more than one subject, whole act void, 144.
- the provision construed with reference to acts for various purposes, as follows:
 - acts incorporating or relating to railroads and common carriers, 146.
 - acts creating, regulating or otherwise relating to corporations in general, 147.

The references are to the sections: Vol. I, §§ 1-808; Vol. II, §§ 309-721.

TITLES OF STATUTES (continued)—

- acts to create municipal corporations or to revise, consolidate or amend their charters, 148.
- acts relating to light, water, railroads, etc., in municipalities, 149.
- acts relating to municipal streets, improvements, buildings, lands, etc., 150.
- acts relating to the annexation and exclusion of territory to or from municipalities, 151.
- miscellaneous acts relating to municipal corporations, 152.
- acts relating to counties and county seats, 153.
- acts relating to schools, school districts and education, 154.
- acts relating to offices and officers, 155.
- acts relating to irrigation, drainage, levees, and the like, 156.
- acts relating to roads, bridges, ferries, etc., 157.
- acts relating to courts and judicial practice and proceedings, 158.
- acts relating to probate law and the descent of property, 159.
- acts relating to elections, 160.
- acts relating to taxation and revenue, 161.
- curative acts and provisions, 162.
- acts relating to intoxicating liquors, 163.
- pure food laws, 164.
- acts relating to gaming, pool-selling, etc., 165.
- acts relating to fish, game, etc., 166.
- acts relating to crimes in general, 167.
- acts relating to convicts and penal institutions, 168.
- miscellaneous cases in which acts were held valid, 169.
- miscellaneous cases in which acts were held invalid, 170.
- of appropriation bills, 171.
- effect of re-enactment of void provision in revision or code, 171.
- provision making operation of act dependent on popular vote valid, though not indicated by title, 171.
- miscellaneous points and questions, 171.
- no part of statute originally, 339.
- of great importance in modern legislation, 339.
- could not, at common law, control plain words in the statute, 339.
- referred to in case of doubt to clear away ambiguities, 339.
- acts identified by, 339.
- when no constitutional barrier, plain words may give act effect beyond, 339.
- effect of constitutional restriction to one subject in, 340.
- act to be construed in view of, 340.
- is a limitation to scope of act, 340.
- an indispensable part of every act, 340.

The references are to the sections: Vol. I, §§ 1-303; Vol. II, §§ 303-721.

TITLE TO LAND —

courts take judicial notice of the source whence derived, 462.

TOLL —

franchise to take not implied in grant, 549.

TOPOGRAPHY —

courts take judicial notice of, of state, 462.

TOWN —

defined and construed, 400.

TOWNS —

subject to legislative control, 662.

may be changed or abolished at the will of the legislature, 662.

TRADE —

includes a cod fishery, 528.

TRANSITORY RIGHTS —

may be enforced anywhere, 14.

title acquired under laws of one country universally recognized,
14.

contracts the same if not contrary to policy of the law of forum,
14.

TREATIES —

state laws give way to, 22.

are part of the law, 326, 458.

judicially noticed, 458.

rights which have vested under cannot be destroyed by the legisla-
ture nor the executive branch of the government, 671.

UNCERTAINTY —

when statutes void by reason of, 86.

UNMARRIED WOMEN —

held to include a widow, 400.

UNREASONABLENESS —

argument against, forcible, 267.

out of place against plainly expressed intention, 367.

UNWRITTEN LAW —

what it includes, 16, 17, 312.

of real property, federal courts follow, as interpreted in state, 315.

USAGE —

will not repeal a statute, 246.

long practice may clear away ambiguities, 246.

VACANCY IN OFFICE —

may exist, though office has never been filled, 400.

filling of, by appointment, 714.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

VENIRE —

requirement that certain words be inserted, mandatory, 629.

VENUE —

acts providing for change of, not *ex post facto*, 655.

VESTED RIGHT —

retrospective laws impairing, 325.

what is, 284.

when party may have in penalty, 286.

effect of repeal of statute on rights vested under it, 284.

cannot be destroyed or impaired, 671.

secured by the bill of rights, 671.

is property as tangible things are, 671.

there is, in an accrued cause of action or defense, 671.

a defense under statute of limitations is, 671.

a title may be so derived, 668, 671.

if a contract when made is a nullity it cannot be made good by an act of the legislature, 671.

a right of redemption once vested is a property right, 671.

it cannot be annulled by a legislative act, 671.

a husband's right in the property of his wife cannot be divested by subsequent legislation, 671.

VETO —

of bills by executive, 64.

VOID —

meaning of, in statute, 400.

VOID IN PART —

whether statutes void in part are void *in toto*, 296-308.

VOLUNTARY CONVEYANCES —

construction of remedial statute relating to, 595.

VOTER —

statutory conditions to right to vote must be complied with, 633.

WAGES (see EMPLOYEES) —

WAGON —

held not to include bicycle, 400.

WAR —

in case of civil, exception to statute of limitations admitted, 702.

WARRANT OF ATTORNEY —

construction of statutes relative to, 602.

WATER CLOSET —

defined and construed, 400.

WATER-COURSE —

grant of, does not include public ferry, 549, 550.

The references are to the sections: Vol. I, §§ 1-808; Vol. II, §§ 809-721.

WEEK —

meaning of, in statute, 716.

WHOLESALE QUANTITIES —

defined and construed, 400.

WIDOW —

statutes giving action to, and next of kin for causing death, 710.
damages from intoxication, 695-700.

WILBERFORCE —

his definition of statute law, 8.

WILFUL —

meaning in statutes, 398, 400.

WILL —

act remedial providing for execution of powers of, by successor of executors, 687.
construction of act making void bequest to witness to, 688.
statute providing requisites of, will not be applied to those which have been executed, 646.
construction of, cannot be affected by act passed after death of testator, 671.
construction of statute requiring attestation in presence of testator, 721.

WITNESSES —

exceptions to competency of, restrictive, 353.
construction of statute prohibiting a party as witness as to transaction, after opposite party dead, 603.
act remedial that bequest to, in will, void, 687.
has vested right in privileges and exemptions conferred by statute at time of testifying, 643.

WOMEN —

right to practice as attorneys at law, 721.
eligibility to office, 721.

WORDS AND PHRASES —

to be construed, or altered or supplied, to advance intention of act, 347, 376.
may be contracted or expanded for that purpose, 348, 367-381.
general, may be cut down to avoid conflict with settled policy 347.
limited expression may be expanded to effect intent, 374.
when intention ascertained it controls, 347.
particular words may indicate a limited intent, 347, 348.
general words in one part may be limited by particular words in another part, 348.
meaning of, in a recent statute will have weight, 358.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

WORDS AND PHRASES (continued) —

- in common use, to be taken in their common signification, 358.
- contemporaneous construction of by legislature high evidence of its intention, 358.
- where they conflict with each other, their import may be varied to avoid the contradiction, 367.
- of absolute repeal, may be qualified by context, 371.
- where they do not directly apply to the particular case, the object of act will determine their sense, 371.
- orphan may be shown by context to mean minor, 371.
- natural sense of, their literal import, 374.
- may be departed from to carry out intention, 374-376, 394.
- general, or clause, may be restricted by evident intention, 376.
- do not always extend to every case within them, 376.
- inquiry is in what sense they were intended to be used, 376.
- may be transposed, 376.
- common or popular, understood in a popular sense, 389, 390, 395, 390, 408.
- extended to all the objects they denote, 389.
- common law, in common-law sense, 389, 398.
- technical, in a technical sense, 389, 393, 517.
- unless context shows different intent, 389.
- of two significations of, the popular should have preference, 390, 394.
- words enlarged or restricted to carry out intent, 381.
- words deemed inserted to carry out intent, 382.
- one word substituted for another, 383.
- words disregarded or eliminated, 384.
- transposition of words and phrases, 386.
- general should receive general construction, 392.
- a statute directing that they be understood according to common usage does not preclude other common-law rules, 396.
- other rules of equal dignity and importance to give effect to legislative intent, 396.
- "immediate danger," how qualified by general intent of act, 396.
- in statute intended for people should be understood in popular sense, 396.
- "or" and "and" construed as interchangeable, 397.
- having special or definite sense in common law, understood accordingly, 398.
- "heir" means one capable of inheriting, 398.
- technical words used relative to technical subject, 395.
- when not so used, 395.
- common, having a technical meaning, presumptively used in popular sense, unless relating to technical subject, 395.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

WORDS AND PHRASES (continued) —

in penal statute, must be clear evidence of intention to depart from popular sense, 395.

statutory user of, 399.

when used in statutes and construed, and afterwards re-enacted. 399.

where re-enactment is with change of phraseology, 399, 401.

meaningless words may be disregarded, 410-413.

omitted words may be supplied, 410-413.

wrong words may be corrected, 410-413.

when descriptive, and essential, must be clear and accurate, 411.

the sense of, modified by context and associated words, 414-419.

effect of qualifying, 420, 421, 423, 437-441.

when general, follow particular words, 422.

words not to receive narrowest interpretation, even in penal statute, 529.

"wife" may be construed "widow" in penal statute in order to effectuate its intention, 529.

"navigating" may be predicated of a vessel at anchor, 529.

"deserting," not predicable of leaving for cause, 527.

"tickets" do not include due-bill for a debt, 531.

technical words to receive a technical construction, 517.

popular, to be construed according to common acceptance, 517.

"trade" includes a cod fishery, 528.

to "persuade" in a penal statute equal to "aid," 528.

meaning of "prize" and "capture" affected by purpose of act, 528.

"mortgagee" in penal statute does not include "assignee," 531.

"officer" in penal laws against excessive fees does not include one who has gone out of office, 531.

when interpretation clause intended to give particular words another than their natural meaning, strictly construed, 576.

may be restrained to bring operation of statute within its intention, 602.

limited to object and subject-matter of the statute, 602.

"laws sometimes construed by context may mean only written laws," 603.

particular words and phrases defined and construed, 400.

accounts, 400.

affirmative statutes, 331, 333.

aggrieved, 400.

appeal, 400.

appropriate, 400.

bill, 67.

bill of exchange, 400.

brothers and sisters, 400.

The references are to the sections: Vol. I, §§ 1-808; Vol. II, §§ 309-721.

WORDS AND PHRASES (continued) —

car, 400.
 child, 400.
 Christian Science, 400, 721.
 citizen, 400.
 city, 400.
 claim, 400, 679.
 class legislation, 202.
 clerk, 400.
 commodity, 400.
 county printing, 400.
 court, 400.
 credible witness, 400.
 crimes, 400.
 damages, 400.
 day, 716.
 debt, 400.
 declaratory statute, 329, 330.
 depositors, 400.
 descent, 400.
 directly, 400.
 distance, 400.
 domestic animals, 400.
 drunkenness, 400.
 due, 400.
 enclosed lands, 400.
 established, 400.
 father, 400.
 fence, 525.
 freeholder, 400.
 from, 185, 400.
 game, 400.
 general law, 194-196, 200.
 gift, 400.
 goods and chattels, 400.
 goods, wares and merchandise, 400.
 grain, 400.
 greater part, 400.
 heir, 400.
 highest office, 400.
 highway, 400.
 householder, 400.
 household furniture, 693.
 house of prostitution, 400.
 immediately, 400.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

WORDS AND PHRASES (continued) —

injury to person, 400.
 in substance, 400.
 internal improvements, 400.
 in transit, 400.
 jail 400
 judgment, 400.
 law of a general nature, 197.
 life insurance companies, 400.
 lot, 400.
 man, 400.
 manufacturer, 400.
 mercantile agent, 400.
 merchant, 400.
 month, 716.
 mortgage, 400.
 municipality, 400.
 negative statute, 331, 332.
 newspaper of general circulation, 400.
 next of kin, 400.
 ordinance, 68.
 osteopathy, 400.
 owner, 400.
 penal statute, 337.
 permissive statute, 334.
 person, 400.
 peddler, 400.
 penalty, 400.
 personal representative, 400.
 petition, 400.
 picture, 400.
 prairie land, 400.
 preamble, 341, 342.
 preceptive statute, 334.
 private statute, 321, 322, 327, 328.
 prohibitive statute, 334.
 prospective statute, 335.
 provisions, 400.
 proviso, 345, 351-354.
 public place, 400.
 public statute, 321, 327 328.
 railroad, 400.
 real estate, 400.
 relative, 400.

The references are to the sections: Vol. I, §§ 1-308; Vol. II, §§ 309-721.

WORDS AND PHRASES (continued) —

remedial statute, 336.
 residence, 400.
 retrospective statute, 335.
 rights and effects, 400.
 road, 407.
 saloon, 400.
 saving clause, 354, 355.
 session, 66.
 set line, 400.
 side track, 400.
 since, 377, 400.
 sinking fund, 400.
 slander, 400.
 storehouse, 400.
 state, 400.
 statute, 400.
 street, 400.
 street work, 400.
 structure, 400, 525.
 suit, 400.
 surety, 400.
 tax, 400.
 telegraph, 400.
 term of court, 400.
 till, 185.
 to, 185.
 town, 400.
 trade, 127.
 uniform operation, 198.
 unmarried woman, 400.
 until, 185.
 vacancy in office, 400.
 village, 400.
 void, 400.
 wagon, 400.
 water closet, 400.
 week, 716.
 wholesale quantities, 400.
 wilful, 400.
 work, 400.

WORK —

in mechanics' lien law, held to include superintendence, 400.

WRITTEN LAW —

what included, 312, 317.

